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The Use of Social Media Evidence in Criminal Child Support Prosecutions

by Maureen Atwell*

* J.D., University of Wisconsin Law School, 2008; B.A. Hunter College, 2005; Assistant District Attorney overseeing the Felony Failure to Support Unit, Milwaukee County District Attorney's Office. For helpful comments and suggestions, I am grateful to Assistant District Attorneys Denis Stingl and Marissa Santiago.

Maggie and Joe had a child in 2001 when Maggie was just eighteen years old and Joe was twenty-two years old. Although Maggie hoped that Joe would be a good father, he took little interest in the child and broke up with Maggie shortly after their daughter, Kate, was born.

Maggie was unable to go to college as she had planned, and instead went to work full-time in a nursing home at minimum wage, while Kate attended a state-funded daycare. When Maggie asked Joe for help supporting Kate, Joe told her he was broke because he was starting his own drywall business. Shortly after that, Maggie saw Joe driving a construction van with "Joe's Drywall" written on the side.

By the time Kate was two years old, Joe had never contributed anything to her support, and had also stopped visiting Kate. Maggie was now working two jobs and struggling to find adequate daycare for Kate. She realized that Joe would never support Kate voluntarily. Finding it nearly impossible to support a child alone, Maggie took Joe to court for child support.

At their first appearance in family court, Maggie was shocked to learn that Joe had a three-year-old child, born just months before Kate, whom he also did not support. Joe told the court that he was trying to start his own business, but was currently unemployed, and that he was already ordered to pay $150 per month in child support for his son, which he could not afford. Taking into account Joe's dire financial situation, the court ordered Joe to pay just $70 per month in child support for Kate.

Between 2004 and 2011, Joe never made a single child support payment for Kate, or for his other children. The local child support agency attempted to locate wages for Joe that could be garnished, but could find no record of his income. The agency also could not find a bank account, vehicle registration, or any property belonging to Joe. They did, however, find records that Joe had another child in 2006, and another in 2009. He never paid support for any of those children.

By the time Kate was eight years old, she and Maggie were living in public housing and receiving a small amount of food stamps. Despite this assistance, they still found it difficult to survive on Maggie's minimum wage job. Additionally, Kate sometimes went to school without school supplies or warm clothing in the winter.

Maggie went to family court over twenty times in an attempt to get Joe to pay child support for Kate. If he showed up for court, he would tell the judge that he had just gotten a job and promise that he would start paying support immediately. If he failed to appear, the court would issue a bench warrant for his arrest, and sometimes years passed before he was arrested on the warrant.

Twice the court ordered Joe to participate in a state-funded program designed to help him get a job, but Joe never showed up for the program. He was held in contempt in 2011 and given the option to pay one thousand dollars toward child support or serve thirty days in jail. Within twenty-four hours, he paid the one thousand dollars and was released from custody without serving jail time.

In 2012, Joe was criminally charged with failing to support Kate. By that time, Kate was eleven years old, and the only child support payment Joe had ever made for her or his other children was the one thousand dollars he paid in family court to be released from custody. In criminal court, Joe was offered the assistance of a public defender, but turned it down and hired a private lawyer. His lawyer informed the prosecutor that Joe could not afford to pay $70 per month in child support for Kate because Joe was physically and mentally disabled and survived only by living with his mother. Joe also hired an expert witness to testify that Joe was unable to secure employment because the economy was in a recession and, due to his mental and physical disabilities, Joe had even fewer employment opportunities than the average person.

Joe never worked in a job in the mainstream economy, and never paid taxes or received a W-2. He did, however, earn substantial amounts of money working for cash in his home improvement business.

During the pendency of the case, Maggie informed the prosecutor that Joe had a Facebook profile, which showed pictures of him riding a motorcycle and attending a Packers football game in Green Bay, Wisconsin. The prosecutor obtained a search warrant for Joe's Facebook account. When returned, the Facebook profile contained detailed conversations between Joe, his friends, and business contacts, which revealed that Joe had a flourishing drywall business, three employees working for him off the books, and a recently purchased motorcycle. He also purchased a duplex in 2009, half of which he rented out to tenants. The records revealed that he put the duplex in his girlfriend's name, along with his motorcycle and construction van. The Facebook account also showed numerous photos of Joe on his most recent vacation to Cancun, complete with an airline itinerary and hotel reservations that he sent to his girlfriend through the Facebook messaging system.

Three weeks after the state gave the Facebook discovery to Joe's attorney, Joe pled guilty to all charges against him.[1]

[1] This is not a real case, and any resemblance to an actual case is purely coincidental. The facts presented, however, are based on situations which are present in a typical child support scenario.

I. INTRODUCTION

The above fact pattern may seem extreme or exaggerated, but to those who work in the child support field, this is a common scenario that occurs every day.

When considering criminal charges for failure to pay child support, one of the most important facts that a prosecutor must determine is whether the offender had assets during the "charging period."[2] Before filing criminal charges, it is critical for the prosecutor to establish that the offender failed to pay child support intentionally, as opposed to simply being too poor to pay—any doubt in this area could lead to an acquittal or, worse, a wrongful conviction. In a criminal child support case, intent is determined by evidence that shows the person made a choice not to pay child support, despite having the ability to do so. "Ability" typically translates into assets, resources, employability, or some combination of all these factors.

Since criminal charges can have a seriously negative impact on a person's ability to find employment, making it even more difficult for that person to support his or her child, charging someone with a crime for failing to pay child support is a last resort, undertaken only when every other possible remedy has failed. Before criminal charges are filed, all civil methods for getting the offender to pay child support should be exhausted: wage garnishments, property liens, tax intercepts, court-ordered employment services, and any and all other non-criminal options should be aggressively pursued by the courts and child support agency. If all of these efforts fail, criminal charges may be warranted.

As this Article will demonstrate, offenders who are able to evade civil remedies for failure to pay child support are typically people who live "off the grid": working for cash, hiding assets, and putting houses, cars, businesses, and other assets in someone else's name. For these reasons, the primary challenge in prosecuting a criminal child support case is finding evidence of intent. Evidence from social media websites can offer valuable insight into a person's assets and lifestyle that, combined with other evidence, assist a prosecutor in determining whether criminal charges are appropriate. This evidence can also be used at trial to help prove intent.

Sections I and II of this Article are dedicated to explaining the element of intent in a criminal child support case and providing background on the issue of unsupported children. There are two reasons for this: First, the element of intent in a criminal child support case is highly complex. Second, evidence obtained from social media websites is useful in child support cases almost

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[2] In this context, the "charging period" is the time-period during which the offender was ordered to pay child support and did not pay.

exclusively to prove the element of intent. To truly understand the role of social media evidence in a child support case, one must first understand the framework under which it is used.

Section III of this Article discusses the process for obtaining evidence from a social media website, its use at trial, and the legal and logistical issues specific to using such evidence in criminal child support prosecutions. Section IV argues that information obtained from social media websites is a valuable body of evidence that should be routinely used in the investigation and prosecution of the most aggravated child support offenders. Ultimately, this Article argues that prosecutors should not rely solely on traditional evidence in these cases, but rather should strive to utilize every possible source of evidence, including social media evidence.

Overall, this Article will provide the reader with an overview of the prosecution of criminal child support cases, as well as an understanding of the important role that social media can play in ensuring that children like Kate receive the support they deserve.

As a final note, it is unlikely that the Milwaukee County District Attorney's Office is the first and only agency to use social media evidence in a criminal child support prosecution; however, the issue does appear to be novel. For that reason, certain portions of this Article relating to the use of social media evidence in criminal child support cases will be based on my own experiences as a prosecutor and will contain only limited citations to external references.

II. General Considerations in Child Support Prosecutions

A. The Importance of Prosecuting Criminal Child Support Cases

To some, the crime of intentionally failing to pay one's child support might seem like a minor offense, secondary to more "important" crimes like homicide, armed robbery, or sexual assault. However, the consequences of intentionally failing to pay child support are devastating to a large portion of our most vulnerable citizens, and the costs to our society, both quantifiable and not, are staggering.

In 2009, $13.6 billion in child support went unpaid in the United States.[3] This figure represents children that are either living without the most basic necessities or, in some cases, relying on government aid for food and shelter.

[3] The U.S. Census Bureau reports that, in 2009, a total of $21.4 billion of child support was paid in the United States, equaling approximately sixty-one percent of the $35.1 billion that was due. *Custodial Parents Becoming Less Likely to Receive Full Amount of Child Support, Census Bureau Reports*, U.S. Census Bureau (Dec. 7, 2011), http://www.census.gov/newsroom/releases/archives/children/cb11-206.html.

Children from single-parent homes are twice as likely to live below the poverty line than children in the general population,[4] and child support is even more crucial to these impoverished children than to those not living in poverty. For an average single-parent household, child support represents 20.8 percent of the family's income, but for a household living below the poverty line, child support represents a stunning 62.6 percent of the family's income.[5] Yet, despite the obvious importance of child support, the majority of families living in poverty either receive no child support at all, or receive only partial child support payments.[6]

The crime of intentionally failing to pay child support causes untold harm to our communities and to the single parents who are forced to raise their children alone; however, the greatest imposed harm is to the children themselves.

Children living in poverty are far more likely to suffer from a host of lifelong problems than their more affluent peers, including poor academic performance, ill health, and poor social, emotional, and behavioral development. In school, these children are likely to experience chronic absenteeism,[7] grade repetition (being "held back"),[8] learning disabilities,[9] and expulsion or suspension,[10] and they are almost twice as likely to drop out of high school than children living above the poverty line.[11] They participate in fewer enrichment exercises or extracurricular activities[12] and have less access to books and libraries than their classmates who do not live in poverty.[13]

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[4] *Id.*

[5] *Id.*

[6] For the year 2009, among single-parent families living below the poverty line where child support is due, 33.7 percent received no child support at all, 30.2 percent received partial payments, and a mere 36.1 percent received the full amount of child support due to them. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, P60-240, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 8 fig.4 (2011).

[7] *See generally How Maternal, Family and Cumulative Risk Affect Absenteeism in Early Schooling: Facts for Policymakers*, NAT'L CTR. FOR CHILDREN IN POVERTY (Feb. 2008), http://www.nccp.org/publications/pdf/text_802.pdf.

[8] Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, FUTURE OF CHILDREN, Summer/Fall 1997, at 55, 58 tbl.1, *available at* https://www.princeton.edu/futureofchildren/publications/docs/07_02_03.pdf (summarizing studies of the effects of poverty on children).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See* Jason M. Fields & Kristin E. Smith, *Poverty, Family Structure, and Child Well-Being: Indicators From the SIPP* (U.S. Census Bureau, Working Paper No. 23, 1998), *available at* http://www.census.gov/population/www/documentation/twps0023/twps0023.html.

[13] *See* Susan B. Neuman & Donna Celano, *Access to Print in Low-Income and Middle-Income Communities: An Ecological Study of Four Neighborhoods*, READING RESEARCH QUARTERLY, Jan.-Mar. 2001, at 8, 15-22, *available at* http://deepblue.lib.umich.edu/bitstream/handle/2027.42/88026/RRQ.36.1.1.pdf?sequence=1.

Living in poverty is also a strong negative indicator for a child's health, both short-term and long-term. Children in poverty also face overcrowded or inadequate housing where they are exposed to rodents, pollution, toxic substances, poor ventilation, exposed wiring, lack of heating, and other dangerous or unhealthy conditions.[14] They also suffer from hunger and malnutrition, experiencing food insecurity four times as often as other children.[15] Conversely, they are twice–as-likely to suffer from childhood obesity than their peers who live above the poverty line.[16] These factors translate to an increased risk of chronic asthma, heart disease, infant mortality, low birth weight, lead poisoning, stunted growth, and lower immunization rates, among other risks.[17]

When they reach adolescence, these children are at an extremely high risk of substance abuse,[18] gang involvement,[19] teen pregnancy,[20] and juvenile

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[14] Yumiko Aratani et al., *Rent Burden, Housing Subsidies and the Well-being of Children and Youth*, NAT'L CTR. FOR CHILDREN IN POVERTY, 3 (Nov. 2011), http://www.nccp.org/publications/pdf/text_1043.pdf. *See also* Diana Becker Cutts et al., *US Housing Insecurity and the Health of Very Young Children*, 101 AM. J. PUB. HEALTH 1508, 1508 (2011), *available at* http://www.childrenshealthwatch.org/upload/resource/ushousingandchildhealth_ajph_dc_aug11.pdf.

[15] Food insecurity is defined as "a household-level economic and social condition of limited or uncertain access to adequate food," which is measured by such factors as not eating for a whole day due to lack of money for food, inability to afford balanced meals, weight loss due to not being able to afford food, and other factors related to not having the financial resources to purchase sufficient food. *Definitions of Food Security*, U.S. DEP'T OF AGRIC., http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx (last updated Sept. 4, 2013).

[16] A number of factors explain the link between food insecurity and obesity, including cycles of food deprivation and overeating, lack of access to healthy foods and fresh produce in lower-income neighborhoods, and fewer opportunities for physical activity. *See Why Low-Income and Food Insecure People are Vulnerable to Overweight and Obesity*, FOOD RES. & ACTION CTR., http://frac.org/initiatives/hunger-and-obesity/why-are-low-income-and-food-insecure-people-vulnerable-to-obesity/ (last visited Oct. 25, 2013).

[17] Brooks-Gunn & Duncan, *supra* note 8, at 57-64. *See also Poverty Threatens Health of U.S. Children*, AM. ACAD. OF PEDIATRICS (May 4, 2013), http://www.aap.org/en-us/about-the-aap/aap-press-room/pages/Poverty-Threatens-Health-of-US-Children.aspx.

[18] SHANNON STAGMAN, SUSAN WILE SCHWARZ & DANIELLE POWERS, ADOLESCENT SUBSTANCE USE IN THE U.S.: FACTS FOR POLICYMAKERS, NAT'L CTR. FOR CHILDREN IN POVERTY (2011), http://www.nccp.org/publications/pdf/text_1008.pdf.

[19] Karl Hill et al., *Childhood Risk Factors for Adolescent Gang Membership: Results from the Seattle Social Development Project*, 36 J. RES. CRIME & DELINQ. 300, 313-14 (1999), *available at* http://www.hawaii.edu/hivandaids/Childhood_Risk_Factors_for_Adolescent_Gang_Membership_(Seattle).pdf.

[20] Brooks-Gunn & Duncan, *supra* note 8, at 58 tbl.1.

delinquency.[21] They also face lifelong prospects of underemployment and low-wage work.[22]

To our society at large, this crime represents a tremendous, and unnecessary loss of human capital. Allowing these children to be raised in poverty creates a huge burden on our welfare and criminal justice systems, and results in a less educated, less healthy, and less skilled workforce in general, and perpetuates a cycle of poverty, welfare dependence, and crime, particularly if these children become pregnant as teens.

The custodial parent, defined for the purposes of this Article as the single parent who has physical custody of the child, is also harmed by this crime. To a single parent raising a child alone, the lack of child support may represent not only a life of poverty, but the need to work multiple jobs, the inability to further their own education or self-promote themselves within their job, and the loss of desperately needed income when they must go to court repeatedly in an effort to get the offender to pay support. By far, the custodial parents most frequently victimized by this crime are women[23] and African-Americans,[24] both of which have historically suffered from discrimination, and therefore, may already be at a disadvantage for employment, housing, and educational opportunities.

In sum, the consequences of unpaid child support are devastating to the children, the custodial parents, and our society in general. These consequences are entirely preventable in situations where a parent is able to pay child support but chooses not to. For these reasons, the prevention and prosecution of this crime is extremely important.

B. "Deadbeat" vs. "Deadbroke": The Element of Intent in a Criminal Child Support Case

Childhood poverty due to lack of child support is tragic, but it is doubly tragic when it is unnecessarily caused by one parent's willful neglect. There is an important difference between a parent who fails to pay child support because he or she cannot afford to pay, and a parent who decides not to pay child support despite having the ability to do so, and that is the element of intent.

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[21] Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 53 (2012).

[22] *See generally* HOWARD STEVEN FRIEDMAN, THE MEASURE OF A NATION: HOW TO REGAIN AMERICA'S COMPETITIVE EDGE AND BOOST OUR GLOBAL STANDING (2012).

[23] In 2009, 82.2 percent of custodial parents were mothers. *Custodial Parents Becoming Less Likely to Receive Full Amount of Child Support*, *supra* note 3. The percentage of custodial mothers living in poverty between 1993 and 2009 ranged from approximately thirty to thirty-five percent, whereas the percentage of custodial fathers living in poverty during the same time period was only approximately fifteen to twenty percent. GRALL, *supra* note 6, at 4 fig.1.

[24] In 2009, African American custodial parents had one of the lowest rates of receiving all child support that was due (33.2 percent). GRALL, *supra* note 6, at 9 n.26.

Intent is the single most critical element in a criminal child support case. Child support cases are prosecuted in criminal court for the purpose of targeting the so-called "deadbeat" parent: one who has the assets or the ability to support his or her child but who makes a conscious decision not to, whether out of selfishness, vindictiveness, a desire for control, or some other reason. The element of intent separates a "deadbeat" parent from a parent who fails to pay support for reasons beyond his or her control, whether because of poverty, disability, or some other factor.

Poverty is not a crime, and prosecuting someone who cannot pay child support due to factors beyond his or her control is unjust, illegal, and fruitless. Incarcerating a parent solely because he or she is too poor to pay child support is analogous to debtor's prison, a concept that has been condemned on both humanitarian[25] and Constitutional grounds.[26] From a practical perspective, prosecuting a parent who does not have the ability to pay child support accomplishes nothing, and in fact could make it harder for that person to get a job in the future.[27]

In the United States, legislative bodies in all fifty states and the District of Columbia have recognized the importance of differentiating "deadbeat" parents from "dead broke" parents, and have used the element of intent to accomplish that goal. All criminal statutes for failure to pay child support in the United States contain either: 1) an element of intent; 2) an affirmative defense of non-intent; or 3) both.[28] In short, the statutes target only those individuals who have the ability to pay child support, but deliberately choose not to.

One of the primary challenges in establishing intent in a criminal child support case is the fact that many, if not all, of the offenders either work cash jobs, or deliberately work no job at all in an attempt to evade child support. When an individual works a traditional job with a traditional payroll system, his or her earnings are typically verifiable and can be garnished if necessary. However, proving that someone works for cash or willfully maintains unemployment can be a difficult hurdle for the State to overcome. In these situa-

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[25] Freedom from debtors' prison is considered a human right under the International Covenant on Civil and Political Rights, ratified by the United States in 1992. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

[26] Tate v. Short, 401 U.S. 395, 397-98 (1971) (it is a denial of equal protection to convert a fine into jail time solely because the offender is indigent and cannot pay); Williams v. Illinois, 399 U.S. 235, 242-44 (1970) (extending maximum incarceration time solely due to inability to pay a fine or court costs violates equal protection), Bearden v. Georgia, 461 U.S. 660, 668-69 (1983) (a term of probation may not be revoked simply for inability to pay a fine).

[27] *See Criminal Records and Employment*, NAT'L EMP'T LAW PROJECT, http://www.nelp.org/site/issues/category/criminal_records_and_employment/ (last visited Oct. 26, 2013).

[28] *See* Appendix A for a chart of criminal child support statutes by state.

tions, the prosecutor must look for evidence that demonstrates that the person has assets or the ability to pay child support.

To understand the role of intent in a criminal child support case, one must understand the process by which these cases are prosecuted. In the United States every state, and the District of Columbia, has an agency to enforce child support.[29] Overseen and partially funded by the Federal Office of Child Support Enforcement, these agencies are charged with enforcing child support through civil remedies.[30] While the specific procedures and requirements for criminal prosecution of child support cases differ in every jurisdiction, one commonality throughout jurisdictions is the requirement that criminal charges are a remedy of absolute last resort. They are to be used only after every other possible effort has failed. While this is generally a policy decision,[31] some jurisdictions have also codified the requirement in law.[32]

What does it mean to use criminal prosecution as a last resort in a child support case? When a person fails to pay support, the first steps taken by the local child support enforcement agency typically involve garnishing wages, intercepting tax refunds, and placing liens on property and bank accounts.[33] These actions are effective for offenders who work traditional jobs, file taxes,

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[29] *State and Tribal Child Support Agency Contacts*, OFF. OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.acf.hhs.gov/programs/css/state-and-tribal-child-support-agency-contacts-map (last visited Oct. 26, 2013).

[30] *OCSE Fact Sheet*, OFF. OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.acf.hhs.gov/programs/css/resource/ocse-fact-sheet (last visited Oct. 26, 2013).

[31] *See, e.g.*, MD. JUDICIARY, CONTEMPT AND ENFORCEMENT OF CHILD SUPPORT: WHAT CAN I DO IF THE OTHER PARENT DOES NOT PAY? (2004), *available at* http://www.mdcourts.gov/family/publications/cs6.pdf. *See also* Press Release, Office of Commc'ns & Legislative Affairs, W. Va. Dep't of Health & Human Res., Criminal Prosecutions Successful in Collection of Child Support Obligations, http://www.wvdhhr.org/communications/news_releases/crim_pros.asp (last visited Oct. 26, 2013). *See also* JOHN BEAUDUY ET AL., TEX. OFFICE OF THE ATTORNEY GEN., CRIMINAL NONSUPPORT 1-2 (2007), https://www.oag.state.tx.us/AG_Publications/pdfs/crimnonsupport_2007.pdf.

[32] *See, e.g.* MINN. STAT. § 609.375 (2013), *available at* https://www.revisor.mn.gov/statutes/?id=609.375 ("A person may not be charged with violating this section unless there has been an attempt to obtain a court order holding the person in contempt for failing to pay support . . . ."). *See also* 231 PA. CODE § 1910.25-7 cmt. (2013), *available at* http://www.pacode.com/secure/data/231/chapter1910/s1910.25-7.html ("The contempt process, which should be used as a last resort, is necessary to impose coercive sanctions upon those obligors whose circumstances provide no recourse to the court to compel payment or a good faith effort to comply."). *See also* FLA. STAT. § 827.06 (2013) ("[I]t is the intent of the Legislature that the criminal penalties provided for in this section are to be pursued in all appropriate cases where civil enforcement has not resulted in payment.").

[33] *See* 42 U.S.C. § 666(a)(17) (2006). *See also* OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., ESSENTIALS FOR ATTORNEYS IN CHILD ENFORCEMENT 231 (3d ed. 2002), *available at* http://www.acf.hhs.gov/sites/default/files/programs/css/essentials_for_attorneys_ch10.pdf.

and/or have assets in their own name. However, these methods fail to have any effect on two classes of offenders: those who quit their job as soon as the child support agency "catches up with them" (i.e., discovers where they work and garnishes their wages), and those who work "under the table," deliberately hide money, and put houses, cars, and businesses in other people's names.

1. The Role of Undocumented Income in a Child Support Case

Undocumented income and assets are an integral part of criminal child support cases, and are a far more common phenomenon in the United States than one might assume. Unreported income, often described as money earned "off the books" or "under the table," accounts for billions of dollars per year in the United States, and is on the rise. Although difficult to measure by its nature, studies conducted in the last two decades estimate that unreported income rose from 8.1 percent, or $461 billion, of the Gross Domestic Product in the United States in 1991,[34] to 8.7 percent of the Gross Domestic Product in 2001.[35] Other studies indicate that the "shadow economy" in the United States could represent anywhere between 6.7 percent[36] to 25 percent[37] of our total economy with males earning an estimated two-thirds of this undocumented income.[38]

Undocumented income is particularly problematic in a child support case, where a support order calculation is based on a person's earnings. If a non-custodial parent earns undocumented income, there is little, if anything, to stop that person from misrepresenting their earnings to the court. This can result in a support order being imputed on minimum wage, or even lower, when the non-custodial parent is actually able pay far more than he or she claims.[39] As will be discussed later in this Article, evidence obtained from social media websites is particularly valuable when an offender earns undocumented income.

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[34] Morton Paglin, *The Underground Economy: New Estimates from Household Income and Expenditure Surveys*, 103 YALE L.J. 2239, 2248 (1994).

[35] Friedrich Schneider, Professor of Economics, Johannes Kepler University of Linz, Size and Measurement of the Informal Economy in 110 Countries Around the World 20 tbl. 8, Paper Presented at Workshop of Australian National Tax Centre, ANU, Canberra, Australia (July 17, 2002), *available at* http://www.econ.puc-rio.br/gfranco/Schneider_informal_economy.pdf.

[36] *See* FRIEDRICH SCHNEIDER & DOMINIK H. ENSTE, THE SHADOW ECONOMY: AN INTERNATIONAL SURVEY 35 (2002).

[37] *Id.* at 41.

[38] *Id.* at 82.

[39] As a prosecutor of criminal child support cases, this author has seen support orders as low as $25 per month, with the average support order in a criminal case being between $75 and $150 per month. In the category of offenders earning unreported income, this author sees a large number of barbers, general contractors, small business owners, disk jockeys, tattoo artists, and drug dealers.

2. Pre-Contempt Civil Proceedings

If wage garnishments, tax intercepts, and property liens fail to persuade an offender to pay his or her support, the child support agency can then attempt more coercive civil measures, such as suspending the offender's driver's and/or other professional licenses, and revoking his or her passport.[40] If all of these measures fail, the custodial parent or the state can ask the court to commence contempt proceedings against the offender,[41] as a last resort before criminal charges.

In most jurisdictions, the contempt procedure is initiated by serving the offender with an "Order to Show Cause," meaning that he or she must appear in court and show just cause for failing to pay child support.[42] As with criminal non-support statutes, a person may only be found in contempt of court if he or she has the ability to pay child support but intentionally and willfully fails to do so.[43] An individual cannot be held in contempt solely because he or she is unable to pay child support.[44]

In certain jurisdictions, contempt proceedings are initiated in front of a circuit court commissioner, as opposed to a judge.[45] In these initial hearings, if the offender claims to be unemployed or too poor to pay child support, the court will usually give the person time to find a job, order him or her to make a certain number of job applications per week, and require the person to come back to court every few months to show proof of a job search, typically in the form of a written record or log of job applications. When ordering the job search, the court can threaten to hold the offender in contempt if he or she does not comply, which could carry a penalty of up to six months of incarceration.[46] If the process of having a job search supervised by the court and the threat of contempt still does not encourage the offender to start paying child support, the court may then order the offender to participate in programming designed to help him or her get a job. Comprehensive state-funded programs designed to

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[40] *See* 42 U.S.C. § 652(k) (2006).

[41] OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 33, at 218.

[42] *See, e.g.*, *How is the Support Order Enforced?*, CLARK COUNTY PROSECUTING ATT'Y CHILD SUPPORT DIVISION, http://www.clarkprosecutor.org/html/child/child2b.htm (last visited Oct. 26, 2013) (Indiana); *Motion to Enforce Domestic Orders (Order to Show Cause)*, UTAH ST. CTS., http://www.utcourts.gov/howto/family/enforcement/ (last updated Apr. 4, 2013).

[43] Benn v. Benn, 602 N.W.2d 65, 69 (Wis. Ct. App. 1999); *See also* Haeuser v. Haeuser, 548 N.W.2d 535, 543 (Wis. Ct. App. 1996), *abrogated on other grounds*, Kruckenberg v. Harvey, 2005 WI 43, ¶ 62, 279 Wis.2d 520, 694 N.W.2d 879 (The court must find that "the person is able to pay and the refusal to pay is willful and with intent to avoid payment.")

[44] Van Offeren v. Van Offeren, 496 N.W.2d 660, 666 (Wis. Ct. App. 1992).

[45] WIS. STAT. § 767.57(1h) (2013).

[46] WIS. STAT. § 785.04(1)(b) (2013).

help non-custodial parents to obtain jobs are utilized by courts throughout the country.[47]

If an offender fails to appear for the employment programming or refuses to comply with the services offered, this may be an early indicator that he or she either does not want a job, or is already working a more lucrative job under the table.[48] If the offender does not comply with the employment programming, the court will typically order the offender back to the program at least one more time to give him or her yet another chance to comply. If the person fails to comply a second time, this may be an even stronger indicator that he or she is intentionally and willfully failing to pay child support. At that point, the case will likely enter into the process of contempt proceedings.

3. Contempt Findings, Purge Payments, and Referral for Criminal Charges

Once contempt proceedings are initiated, the offender may be given several more chances to find a job, and another opportunity to participate in employment programming. If all of these efforts fail, the offender will likely be held in contempt if the court is convinced that his or her failure to pay child support is intentional. After an offender is held in contempt, a court is still unlikely to impose an immediate period of incarceration. Rather, a court will usually stay the sentence for a series of "review" dates, giving the offender more time and opportunity to find a job. During this period, if the offender pays support every month and gets a job, the incarceration time generally will not be imposed. If

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[47] For example, in Milwaukee County, a program called Children First is funded through the Wisconsin Department of Children and Families and pairs with a number of other state, federal and privately funded programs to offer a plethora of services to non-custodial parents. Participants must attend the program thirty-two hours per week for sixteen weeks, and are given services tailored to their needs. These services include referrals to jobs, one-on-one GED tutoring, computer classes, assistance with drafting resumes, interview skills workshops, and vocational training including welding classes, asbestos abatement, clerical training, commercial cleaning, and others. The program also offers referrals to job fairs, English as a second language (ESL) classes, literacy tutoring, alcohol and drug addiction services, parenting classes, and counseling. Children First also has a program called "community work service," where the participant is placed with a for-profit business at the state's expense for up to six months. The goal of this program is for the participant to be hired by the business at the end of the six month period, or, failing that, to at least gain job skills and work experience. For those seeking any excuse not to participate in the program, Children First also provides bus vouchers or weekly bus passes for participants to get to the program, participate in services, and go to job interviews. *See* WIS. DEP'T OF CHILDREN & FAMILIES, 2013 CHILDREN FIRST PROGRAM GUIDE (2013), http://dcf.wisconsin.gov/memos/dfes/2012/pdf/dfes12_13_attachment4.pdf.

[48] The majority of offenders who are charged with criminal non-support in Milwaukee County have refused to participate in the Children First program at least once, despite being ordered by the court.

the offender comes back to court several months later and still has not found a job, the court might again stay the sentence and give him or her yet another chance to comply.

Finally, if it becomes clear that the offender is simply not going to comply with the court's orders, the judge may lift the stay on the sentence and require the offender to serve incarceration time, but will usually give the person an option for a "purge" payment. This type of payment occurs when the court incarcerates the offender, but orders that the offender be released if, at any point during the sentence, he or she pays a specific sum of money toward the support arrears.[49] Perhaps surprisingly, offenders are often able to come up with large sums of money, sometimes within just a few hours, to free themselves from jail. This is another indicator that the offender has the assets to pay child support but is intentionally choosing not to do so.

Throughout this process, the custodial parent must appear in court repeatedly to prosecute the case. He or she must take time off from work, sometimes without pay, thus causing even more personal and financial hardship. During the process, the offender is likely to fail to appear in court numerous times and evade law enforcement. This can delay the case for years, and force the custodial parent to endure yet more hardship. The time between the first efforts made by the child support agency at wage garnishment to the time the offender is held in contempt typically spans several years. During this time, the offender has paid little or no child support, has passed up all the opportunities that the court and the state-funded employment programming services offered, and has no traceable income or assets. Interestingly, the offender still somehow managed to feed, clothe, and shelter him or herself, and has paid a large "purge" on short notice, all allegedly without a job.

When enforcement efforts through the courts and the child support agency have failed, the case becomes appropriate for consideration of criminal charges.

C. Criminal Child Support Charges

Much is at stake when reviewing a child support case for criminal charges. Child support cases are unique among criminal cases in that the offender may have a legitimate excuse for committing the crime. Unlike more tangible crimes like bank robbery, drug dealing, or battery, failure to pay child support often revolves around questions of a person's employability and his or her desire to support his or her child; items that are difficult to quantify by their

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[49] *Child Support Definitions: Purge Conditions*, WIS. DEP'T OF CHILD. & FAMILIES, http://dcf.wi.gov/bcs/definitions.htm (last updated Oct. 18, 2012). Purge payments in Milwaukee County are typically between one thousand and several thousand dollars. A purge is not considered a bail bond, and the state of Wisconsin does not allow surety or commercial bail (i.e., bail bondsmen), so the entire amount must be paid by the offender before he or she can be released.

very nature. With intent involving factors that are not always explicit, a careless decision by the prosecutor has the potential to seriously damage the very people the state seeks to protect. Wrongfully charging a non-paying parent with a crime, particularly a felony, solely because they are too poor to pay is not only contrary to the idea of justice, it could substantially worsen a family's financial situation. As discussed in the previous section of this Article, the element of intent is absolutely crucial when determining whether to file criminal charges. Intent is an element that must be proven beyond a reasonable doubt to a unanimous panel of twelve, of which a prosecutor should be utterly convinced before filing criminal charges.

Intent, while arguably the most important factor in a criminal child support case, is not the only element that must be proven. Under most statutes, the state must also prove that the offender was ordered by a court to pay child support, knew about the order, and failed to pay for a given period of time.[50] However, with a few exceptions, these elements tend to be less complex than the element of intent. Proving the existence of a court order is generally a matter of judicial notice, lack of payment can usually be shown by financial records, and knowledge of the support order can be demonstrated by an offender's presence in court when the child support was ordered, or by his or her continued presence in court throughout the civil enforcement process.

1. Four Traditional Sources of Evidence of Criminal Intent

As demonstrated in Section III of this Article, if civil enforcement efforts have truly been exhausted before criminal charges are considered, some indicators of intent should already be present before the prosecutor reviews the case for potential criminal charges. For example, a history of repeated refusals to participate in court-ordered employment services, despite continuing claims of unemployment or poverty is one indicator. Another indicator is a demonstrated ability to pay a large purge on short notice.

A third indicator of intent is a pattern of payments that demonstrates the offender's unwillingness to pay child support. This is a natural byproduct of the process of exhausting civil remedies. Some offenders will go years without paying support, but will consistently make a payment the day before they are scheduled to be held in contempt in family court, representing to the court that they are now employed and should not be taken into custody or risk losing their job. Others will not make any support payments for years, or even decades, despite the order being as low as twenty-five or fifty dollars per month.

If a person fails to pay child support for a few months, there may be any number of reasons for that failure – loss of a job, an extended illness, or a

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[50] *See* Appendix A.

family crisis, to name a few. However, if a person fails to make a single child support payment for ten years, there is less likely to be any legitimate explanation, particularly if the person uses the excuse of unemployment or poverty during the enforcement process in family court. Typically, the longer the time period of non-support, the stronger the indication of the intent to avoid payment.[51]

A fourth indicator of intent, and one that can be extremely valuable, is information provided by the custodial parent. The custodial parent is likely to be the only person associated with the case with firsthand knowledge of the offender's assets and intent. He or she is likely to have interacted with the offender over a period of years and can testify to his or her observations of the car the offender drives, the house where the offender lives, and the lifestyle led by the offender. The custodial parent can also testify as to statements made by the offender about paying child support (i.e., "You'll never get a dime out of me.") More importantly, the custodial parent can provide valuable information about the offender's relationship with the child.

A parent who is very present in a child's life, regardless of how much money that parent is able to spend on the child, demonstrates a certain amount of interest in the child's well-being. On the other hand, a parent's refusal to spend time with the child or take any other type of non-financial responsibility for the child tends to demonstrate his or her overall lack of interest in the child. Consequently, this may reflect his or her lack of desire to support the child financially. A parent who claims to have failed to pay child support solely due to unemployment or poverty cannot use the same excuse for failing to spend time with the child. In fact, a state of unemployment could generate an abundance of spare time, which in turn should make it easier for the offender to be present in the child's life.

In many cases, an offender will claim that his or her failure to spend time with the child was caused by the custodial parent refusing to allow visitation. However, this claim is almost always refuted, not only by the custodial parent, but by court records. The family court records relating to the most egregious child support cases often reveal years' worth of court documents that chronicle efforts on the part of the custodial parent to force the offender to spend time with the child. An offender's noncooperation with court-ordered visitation,

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[51] Depending on the jurisdiction, a prosecutor may be able to charge an offender with failure to pay child support for many years at a time, regardless of whether the time period goes beyond the statute of limitations. For instance, in Wisconsin, the statute of limitations on a criminal child support case runs from the last date the offender intentionally failed to pay child support, if the crime is charged as a continuing offense. State v. Monarch, 602 N.W.2d 179, 182 (Wis. Ct. App. 1999). Thus, if an offender failed to pay child support between 1999 and 2013, the offender could be charged with that entire time period.

noncooperation with guardian *ad litems*, and noncooperation with court-appointed mediators on issues of visitation are emblematic of these cases.

All four of these indicators of intent should be available to the prosecutor at the time of charging, and they have traditionally been the sources of evidence that prosecutors relied upon to evaluate a case for criminal child support charges. Arguably, they are still the strongest indicators of an offender's intent. However, because of the difficulty in proving intent when an offender earns undocumented income, and because of the importance of not filing criminal charges against someone who fails to pay child support for reasons beyond his or her control, the prosecutor should seek every available source of evidence. Non-traditional sources of evidence exist which could assist the prosecutor in determining whether criminal charges are appropriate. Perhaps the most powerful of these is social media evidence.

III. Specific Evidentiary Analysis

A. Social Media Evidence

Social media websites, such as Facebook, MySpace, and Twitter, can provide a plethora of evidence about a child support offender's lifestyle, assets, employment, job skills, computer proficiency, and even their feelings about paying child support. Evidence obtained from social media websites includes photos, videos, status updates, messages between the user and his or her friends, and information about the user's computer activity.

Often, offenders who fail to make even the most miniscule payments toward child support and who tell courts that they are living in abject poverty will nevertheless publish pictures of themselves on social media websites holding handfuls of cash, partying in nightclubs, attending professional sporting events, or driving expensive cars.[52] It is not uncommon to see offenders wearing brand-name clothing, expensive shoes, or flashy jewelry in these photos, and many of the offenders will also post pictures of their cars, houses, motorcycles, and even their boats on social media websites. Offenders might also write public statements on their profile about their wealth and their employment, or even about their feelings toward paying child support.

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[52] *See* Alexa Valiente, *Facebook Money Pics Bust Dad for Allegedly Dodging Child Support*, ABC News (Mar. 22, 2013, 6:00 AM), http://abcnews.go.com/blogs/headlines/2013/03/facebook-money-pics-bust-dad-for-allegedly-dodging-child-support/. *See also* Colleen Henry, *Social Media Helping Lead Investigators to Deadbeat Parents*, WISN.com (Apr. 25, 2013, 10:37 PM), http://www.wisn.com/news/social-media-helping-lead-investigators-to-deadbeat-parents/-/9373668/19901576/-/25lfqa/-/index.html#ixzz2cQV0BKbV. *See also Facebook Page at Center of Child-Support Case: Man Claims DA's Office Taking Photos out of Context*, WISN.com (Dec. 10, 2012, 10:56 PM), http://www.wisn.com/news/south-east-wisconsin/milwaukee/Facebook-page-at-center-of-child-support-case/-/10148890/17727682/-/mtjn6x/-/index.html.

The existence of this evidence and its seemingly self-sabotaging nature leads to three important questions: 1) what does the evidence mean in a criminal child support case; 2) how does the state obtain the evidence and use it at trial; and 3) why would an offender publish this information in public? This section seeks to answer these questions and to illustrate the larger, societal implications of the evidence.

1. The Meaning of Social Media Evidence

It can hardly be refuted that social media websites are excellent venues for exaggerating one's wealth and success in life, and it is certainly not uncommon for a person to falsely post pictures of himself or herself leading a richer, flashier, and more exotic lifestyle than he or she truly possesses. For that reason, evidence obtained from a person's social media profile means very little unless the evidence has context that confirms its authenticity.

A picture of an offender holding a large amount of cash does not necessarily mean that the offender is wealthy enough to pay his or her child support. The money depicted in the photo could be borrowed solely for the purposes of the picture, the photo could be very old, or the money could be counterfeit. A picture of a person standing in front of the Eiffel Tower could mean that the person vacationed in Paris, or it could simply mean that the person is handy enough with computer graphics to manipulate a photo to *look* like he or she traveled to Paris. For this reason, a single piece of evidence from an offender's social media profile should not be taken at face value, but rather should be assessed in the context of his or her entire profile, and in the context of all of the other evidence against the offender. The number of photographs, the nature of the photographs, and any communications that support the authenticity of photographs are all factors that help determine the value of the evidence.

Obtaining a search warrant for the offender's entire social media profile will usually reveal wall posts published by the offender, as well as private messages sent between the offender and friends. These communications tend to support or refute the authenticity of photos posted by the offender. As an example, digitally altered pictures from a professional sporting event mean very little. However, when the offender's private messages contain details about buying tickets to the event, selecting seats, carpooling with friends to the event, and preparing food for an after-party, the context helps to authenticate the photos.

The nature of the offender's defense is also an important factor when assessing the evidence on his or her social media profile. For example, a photograph of an offender competing in a tennis tournament might mean very little if his or her defense is involuntary unemployment. However, that same photo becomes extremely relevant if the offender plans to bring a defense of being

too physically disabled to work. Likewise, an offender who claims that he has no computer skills and no computer access as part of a defense of inability to become employed might have a hard time explaining how he digitally altered numerous photos of himself and uploaded them to Facebook. If an offender wishes to portray to the jury an image of himself as a homeless person who is constantly scouring the streets for a job, that image might be compromised by evidence that he spends upwards of eight hours a day chatting with his friends on Facebook via his mobile phone.

Depending on the nature of the evidence and the facts of the case, there may be situations where a single photograph or a single piece of evidence without context is appropriate for use at trial. In that situation, the offender's credibility will determine the authenticity of the evidence. Family court documents are helpful to the prosecutor in predicting issues raised by the offender in the criminal case, and should be carefully reviewed by the prosecutor when reviewing social media evidence and making a charging decision.

2. Obtaining and Using Social Media Evidence in a Criminal Child Support Case

One of the primary hurdles in utilizing social media evidence is locating an offender's social media profile. Although a tremendous number of people maintain social media profiles,[53] a person may use almost any name they wish, real or fake, when creating social media accounts. Thus, an offender named John Smith could easily create an account under the name of Fnu Lnu, regardless of whether that name has any connection to him.[54] Unless the user somehow chooses to connect his profile name to his real name, a search of his real name will not lead to his profile.

There are, however, methods for finding an offender's hidden profile on a social media website, and the custodial parent may be the best resource in this area. If the custodial parent does not know the offender's profile name, he or she may know the offender's nickname or alias, and the names of the offender's friends and family members. In that case, an investigator might look

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[53] As of May 2013, seventy-two percent of adults who use the internet, use social networking sites. Joanna Brenner, *Pew Internet: Social Networking (Full Detail),* PEW INTERNET (Aug 5, 2013), http://www.pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx.

[54] At the time of this writing, there are a minimum of seven Facebook profiles for individuals named "Fnu Lnu," a common law enforcement acronym meaning, "First name unknown, last name unknown." For a history of the term "Fnu Lnu," see Benjamin Weiser, *Who Is Fnu Lnu? Unidentified Defendants Have Bedeviled Courts for Decades*, N.Y. TIMES, July15, 2013, at A11, *available at* http://www.nytimes.com/2013/07/15/nyregion/unidentified-defendants-have-bedeviled-courts-for-decades.html?_r=0.

at the profile of a known friend of the offender. In that person's list of friends, the investigator may find a profile that appears to belong to the offender. Upon locating the profile, the investigator must verify that the profile belongs to the offender in question, and the custodial parent's input is particularly helpful at this stage. The custodial parent can locate the profile and verify that the user's photos depict the offender, that persons located in the user's friend list are, in fact, the offender's friends and that the user's demographic information (i.e., city where the user lives, school the user attended, date of birth of the user, et cetera), matches that of the offender.

Even upon locating the user's social media profile, accessing the information contained within the profile is not always simple. Social media users have the option to make the contents of their profile viewable to the public, or to share that information only with proscribed people, known as "friends." Without "friending" the user, law enforcement personnel cannot view non-public information about the user.[55]

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[55] Under the Model Rules of Professional Conduct, a lawyer may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2009). If a prosecutor creates a social media profile under a fake name and then "friends" an offender, this could be considered misrepresentation. Likewise, if an attorney directs someone else to create a fake social media profile and communicates with the offender, this potentially violates Model Rule 5.3, which prohibits an attorney from directing a non-lawyer to commit an act that would be considered an ethical violation for the attorney. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2011). *See also Use of Nonlawyer Assistance Puts Onus on Law Firm Managers and Supervisors*, 28 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 689 (11-7-12). Additionally, becoming a person's friend on a social media website, under false pretenses or not, could be considered contact or communication with that person, which, in certain circumstances, could violate rules governing a lawyer's contact with represented persons.

Deceit and dishonesty have been accepted practices used by law enforcement investigators and in some circumstances government lawyers. *See* Illinois v. Perkins, 496 U.S. 292, 297 (1990) (statements made by a suspect to an undercover police officer are not subject to *Miranda* protection); United States v. Russell, 411 U.S. 423, 434 (1973) ("Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer."); Hoffa v. United States, 385 U.S. 293, 311 (1966) (holding that the presence of a secret government informant is not per se unconstitutional); Lewis v. United States, 385 U.S. 206, 210-11 (1966) (holding that the presence of a government undercover agent is not per se unconstitutional).

More traditional law enforcement tactics employ the exception using confidential informants and single-party consent telephone recordings, among others. *See* Flaherty v. Arkansas, 94 S. Ct. 1599, 1601 (1974) (noting that evidence recorded with the consent of one party is permissible); *see also* Rathbun v. United States, 355 U.S. 107, 109-11, 109 n.5 (1957) (finding that content from communications overheard on the telephone with the consent of one party admissible and citing other similar decisions). The act of misrepresenting one's identity for the purpose of "friending" an offender on a social media website is an area of law that remains untested. A prosecutor would be wise to avoid friending an offender under false pretenses on a social media website. For an in-depth analysis of the laws governing an attorney's contact with an offender through social media, see Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 265 (2011).

Fortunately, in a criminal child support case, two factors favor the state when investigating an offender's social media profile. First, it is not uncommon for the custodial parent to be friends with the offender on the social media website, thus creating access to the contents of his or her account. The custodial parent can either show the contents of the offender's profile to the prosecutor, or simply tell the prosecutor what he or she saw on the profile. Depending on the facts of the case and the contents of the profile, either may provide sufficient probable cause for the state to obtain a search warrant for the entire contents of the user's account.

The second and more common factor that favors the state in obtaining social media evidence is the fact that much of the useful evidence about a person's assets and lifestyle is readily available on the public portion of their profile, sometimes even when the profile contains only a single profile picture. Cautionary tales of "oversharing" on social media abound, yet no matter how much press the issue receives, unwary users continue to post potentially damaging information about themselves in public without using any of the privacy settings offered by the social media website.[56]

A profile, correctly identified and accessed, must be evaluated for its usefulness in obtaining a search warrant and at trial. The standard for obtaining a search warrant is much lower than for proving elements in a criminal trial. In a criminal trial, all elements of all charges must be proven beyond a reasonable doubt. The standard for a search warrant is that probable cause may be found when the totality of the evidence establishes a fair probability that the item or place to be searched contains evidence of a crime.[57] Thus, the application for a search warrant for a user's social media account should contain a description of why the investigator believes the profile belongs to the offender, and why the investigator believes the user's profile contains evidence of a crime.

Additionally, places searched and items seized must be described with sufficient particularity to satisfy the Fourth Amendment Requirement.[58] For social media evidence, this means that the search warrant must be clear enough to direct the administrator of the website to the correct profile. Most social media websites will have particular methods for identifying users, and the

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[56] *See, e.g.*, Regina Wang, *Dozens of Brooklyn Gang Members Caught after Oversharing on Facebook*, TIME MAGAZINE (Sept. 14, 2012), http://newsfeed.time.com/2012/09/14/dozens-of-brooklyn-gang-members-caught-after-oversharing-on-facebook/. *See also* Karin Klein, *Anti-gay Facebook Postings: The Free-Speech Rights of a Teacher*, L.A. TIMES (Aug. 19, 2011, 12:36 PM), http://opinion.latimes.com/opinionla/2011/08/anti-gay-facebook-postings-when-is-a-teacher-just-a-person.html; Tina Susman, *New Jersey Teacher in Trouble Over Anti-gay Facebook Comments*, L.A. TIMES (Oct. 19, 2011, 7:13 AM), http://latimesblogs.latimes.com/nationnow/2011/10/teacher-in-trouble-over-anti-gay-facebook-comments.html.

[57] *See* Illinois v. Gates, 462 U.S. 213, 232 (1983).

[58] *See* Steele v. United States, 267 U.S. 498, 503 (1925).

investigator should be versed in the requirements of each website. For instance, on Facebook, if a user's screen name is John Smith, he might have a "user ID" of john.smith.28 to differentiate him from all the other users named John Smith. A search warrant for John Smith's Facebook profile would include his screen name, his unique user ID, and a profile page URL.

In sum, the application for the search warrant should describe the user profile with enough particularity for the administrator of the website to locate the correct profile, and should indicate why the investigator believes the profile belongs to the offender, and why the investigator believes the user's profile contains evidence of a crime.

3. Admission at Trial

The chief issue with using social media evidence at trial has traditionally been the question of how to authenticate the evidence. The prosecutor must determine how to admit evidence from a social media website at trial. Because social media is a relatively new source of evidence, the rules governing its authentication are not completely settled. A detailed discussion on the authentication of social media evidence is beyond the scope of this Article. The courts generally treat electronic media evidence the same as traditional evidence. The proponent of the evidence need only make a prima facie showing that the evidence is what the proponent claims.[59] Under the Federal Rules of Evidence, the proponent of the evidence establishes its authenticity if there is "evidence sufficient to support a finding that the item is what the proponent claims it is."[60] The rules for admission of social media evidence are similar to those of other evidence. The proponent of the evidence must describe how, where, and when the evidence was collected, what type of evidence was collected, and who collected the evidence.[61]

Anecdotally, courts in numerous jurisdictions have ruled that circumstantial evidence is sufficient to establish authorship of a social media web page and that evidence to the contrary is an issue of weight for the jury to decide.[62]

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[59] Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007). Calling this standard "not a particularly high barrier to overcome," the Court noted that the opposing party may challenge the authenticity of the evidence, in which case it is for the jury to determine whether the evidence is genuine. *Id.* at 539, 542.

[60] FED. R. EVID. 901(a).

[61] MICHAEL R. ARKFELD, ARKFELD ON ELECTRONIC DISCOVERY AND EVIDENCE § 8.11(C) (3d ed. 2012).

[62] Teinda v. State, 358 S.W.3d 633, 646 (Tex. Crim. App. 2012) (Whether someone else fabricated the offender's page is an "alternate scenario whose likelihood and weight the jury was entitled to assess."). An offender's name or known nickname coupled with photos of the offender and/or identifying demographic information is typically sufficient to provide circumstantial indicia of authenticity. Rene v. State, 376 S.W.3d 302, 306-08 (Tex. Ct. App. 2012). *See also* State

4. Why on Earth Would Someone Do This?

"If there's anything more important than my ego around, I want it caught and shot now."[63]

Understanding the incriminating power that social media evidence can have in a criminal child support case, one might question why on earth a child support offender would publish such damaging information about themselves in public. There may be more than one explanation for this behavior. First, the offender would not be the first to publish something on the internet that he or she thought was private, only to learn later that it was very public indeed.[64] Social media websites appear to be private, providing the unwary user a false sense of security.[65]

Although there is no shortage of social media users who mistakenly believe their posts to be private, there may be a second and perhaps darker reason why a child support offender might publish incriminating information about him or herself on a social media website—the offender's attitudes toward child support.

The rewards for posting flattering pictures of oneself on a social media website might include impressing friends and family members, and even boosting one's own ego or self-esteem. The seemingly addictive nature of social media can perhaps be attributed to the design of the forum: a user posts a photograph or writes a statement, and the user's chosen friends and family members have the option of "liking" (but not "disliking") the photograph or statement, or of making comments on the photograph or statement. In this way,

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v. Assi, No. 1 CA-CR-10-0900, 2012 WL 3580488, at *3 (Ariz. Ct. App. Aug. 21, 2012); State v. Altajir, 33 A.3d 193, 204-05 (Conn. 2012); People v. Valdez, 135 Cal. Rptr. 3d 628, 632-33 (Cal. Ct. App. 2011); Manuel v. State, 357 S.W.3d 66, 83-84 (Tex. Ct. App. 2011); People v. Clevenstine, 891 N.Y.S.2d 511, 514 (N.Y. App. Div. 2009).

63 DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 98 (Del Rey Books 2005) (emphasis in original).

64 *See* Wang, s*upra* note 56.

65 *See, e.g.*, Ken Belson, *Swiss Athlete Sent Home for Twitter Remark*, N.Y. TIMES (July 30, 2012), http://www.nytimes.com/2012/07/31/sports/olympics/swiss-soccer-player-michel-morganella-sent-home-for-twitter-remark.html?_r=0; Press Release, Richmond County District Attorney, EMT Guilty of Official Misconduct for Placing Photo of March 2009 Murder Scene on Facebook (Dec. 10, 2010), *available at* http://rcda.nyc.gov/PDF/Press/2010/pr12102010.pdf; Nathan Koppel, *Students Dodge Legal Trouble Over MySpace Parodies*, WALL STREET J. L. BLOG (June 13, 2011, 5:56 PM), http://blogs.wsj.com/law/2011/06/13/students-dodge-legal-trouble-over-myspace-parodies/?KEYWORDS=students+dodge+legal+trouble+over+myspace+parodies; *Marines Discharge Sergeant for Anti-Obama Facebook Posts*, CBSNEWS (Apr. 25, 2012, 2:52 PM), http://www.cbsnews.com/8301-201_162-57421223/marines-discharge-sergeant-for-anti-obama-facebook-posts/ (last visited July 30, 2013); *Teachers Oversharing On Facebook: 6 Cautionary Tales*, WEEK (Apr. 5, 2011), http://theweek.com/article/index/213894/teachers-oversharing-on-facebook-6-cautionary-tales#.

the social media website serves as a self-affirming tool whereby the user is given constant feedback, usually positive, on his or her postings by a community of people chosen by the user.

Males may be more prone to bragging and boasting than females, particularly when it comes to advertising their material wealth. Specific to males, promoting one's wealth may serve the psychological benefit of portraying oneself as a "breadwinner," thus reinforcing one's image of masculinity.

To the child support offender who publishes incriminating information about his or her wealth on a social media website, the psychological benefits of this act outweigh the danger of the information being used as evidence in court. Unless one believes that these offenders are either unintelligent or seized by an irresistible compulsion to advertise their wealth in public, one may surmise that the offender sees the drawbacks of publishing this information as minimal. One can further surmise that this attitude on the part of the offender indicates that he or she does not believe that society takes the crime of failing to pay child support seriously enough to expend resources on locating and viewing his or her social media profile. In plain English, the offender publishes this information because he or she does not think anyone cares enough about child support to bother to track down a social media profile and use it as evidence in court.

Offenders who believe that society will not punish them for failing to pay child support may not be entirely at fault for fostering that impression. An offender may be correct if he or she guesses that his or her local police department is unlikely to expend any resources at all, much less significant resources, in the investigation of a criminal child support case. The topic of the allocation of resources in police agencies is beyond the scope of this Article, but it is hardly arguable that most police agencies expend little, if any, resources in the pursuit of child support offenders.

The policy of exhausting every possible civil enforcement remedy before resorting to criminal charges may have the unfortunate side effect of demonstrating to offenders that they will not be punished for failing to pay child support. The very purpose of exhausting civil enforcement remedies is to give an offender every possible opportunity to pay support, and the policy is made in recognition that there are ample circumstances under which one may be unable to pay child support. Therefore, the civil process gives offenders chance after chance to pay support, while imposing little, if any, punishment on the offender when he or she continues to fail to pay. This may lead an offender to conclude that he or she will not be punished for failing to pay support, thus face minimal, if any, consequences for posting incriminating evidence about his or her wealth on a social media website.

It is unfortunate that the policy of exhausting civil remedies before resorting to criminal charges may send a message that failure to pay child support carries no consequences, but the policy is utterly necessary to prevent parents from being unfairly prosecuted for simply being poor. Doing away with the policy would not only expose potentially innocent parents to criminal prosecution, it would also eliminate a substantial body of evidence against offenders who fail to pay child support intentionally and willfully. The burden of locating the evidence may fall on the prosecutor's office if local police agencies will not expend resources to investigate criminal child support cases. While prosecutors around the country are underfunded and overburdened with ever-expanding caseloads,[66] the importance of fully investigating criminal child support cases should not be underestimated.

IV. Alternative Sources of Evidence of Intent

The prosecutor has a duty to seek out and evaluate all available evidence, whether it is inculpatory or exculpatory, if the criminal procedure is to be a "search for the truth." In a criminal child support case, anything less than a thorough investigation could subject an impoverished parent to unfair prosecution. Nonetheless, although criminal intent can be particularly difficult to prove in a child support case, the victims of these crimes deserve nothing less than the most dedicated investigation possible.

While the use of social media evidence has the potential to transform a criminal child support case, the prosecutor should not ignore other sources of evidence in its favor. To do justice to these cases, every possible resource should be explored; and this may require creativity from the investigator. Some areas of investigation that can assist a prosecutor in determining intent in a criminal child support case are an offender's non-criminal contacts with police, specific details of an offender's arrest records, civil case filings by or against the offender, and recordings of phone calls made by the offender while in custody.

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[66] *See*, *e.g.*, Am. Prosecutors Research Inst., How Many Cases Should A Prosecutor Handle? 1 (2002), http://www.ndaa.org/pdf/How%20Many%20Cases.pdf. *See also* Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, A Response to Adam Gershowitz and Laura Killinger*, 106 Nw. U. L. Rev. Colloquy 143, 152 n.34 (2011); *See also* John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, *in* The Prosecutor in Transnational Perspective 21 (Erik Luna & Marianne Wade eds., 2012) ("[V]olume is the most salient factor . . . . By all accounts, prosecutors, courts, and defense attorneys are swamped.").

A. Using Non-Criminal Police Contacts

Because the crime of failing to pay child support can span a time period of several years, an offender may have numerous non-criminal police contacts during the time when he or she is failing to pay support. Many of these contacts with police are documented and may help illustrate an offender's assets. For example, an offender might tell a family court commissioner or judge that he is unemployed and has no marketable job skills or assets, but the next week complain to police that his construction site was broken into and several hundred dollars' worth of his construction tools were taken. Another offender might seek police assistance when his Mercedes Benz is dented in a parking lot or his brand new iPad is stolen from a coffee shop when he gets up to use the bathroom. An offender who might not think twice about contacting police about teenagers loitering outside his barber shop, or people parking illegally in front of his auto repair shop, will appear in family court the very next week and claim that he has been unemployed for years.

A quick search of police computers for the offender's name will often reveal valuable evidence stemming from the offender's non-criminal contacts with police. This evidence carries little danger of being deemed "other acts" evidence due to its minimally prejudicial nature, unlike the offender's criminal contacts with police.

B. Using Arrests and Other Criminal Cases to Demonstrate the Offender's Assets During the Charging Period.

One of the first tasks a prosecutor completes when evaluating a case for criminal charges is a review of the offender's record. It is not, however, considered routine practice for a prosecutor to look into the specific details of an offender's prior criminal cases, particularly if those cases are not connected to the crime at hand. For example, wading through dozens of police reports relating to an offender's arrest for possession of cocaine in the year 2005 is neither practical nor necessary when reviewing a 2013 battery case.

When the case at hand involves criminal failure to pay child support, however, details of the offender's prior arrests can provide the prosecutor with valuable evidence to support the element of intent. Court records may contain information about bail money posted by the offender or on the offender's behalf, traffic fines paid by the offender during the charging period, and the make and model of the vehicle driven by the offender. An offender arrested on a matter unrelated to child support during the charging period is frequently found with a large amount of cash on his or her person upon arrest, and this money is typically inventoried and recorded by police. In addition, offenders are commonly able to post thousands of dollars in cash bail in unrelated crimi-

nal cases during time periods when they claimed to be too poor to pay child support. Offenders also are required to give "pedigree" or background information to police, which includes their address and place of employment, information that can be useful to a prosecutor in rebutting a defendant's statements of unemployment or homelessness. An offender might claim to have no vehicle, yet consistently get speeding tickets in the same vehicle over a period of years, and this evidence could be used to rebut the offender's claims that he or she is too poor to afford a car.

Offenders who deliberately evade child support are typically paid in cash and avoid using banks so that their assets cannot be traced, and therefore frequently carry or are able to access large amounts of cash. It is not uncommon for a child support offender to make statements to police about his or her employment, assets, or living situation that are completely contrary to what he or she represented in family court during child support proceedings. Perhaps justifiably, offenders seem to assume that the police and family court do not communicate, and that statements made to a police officer during a traffic stop are highly unlikely to emerge in a child support case.

As a caveat, evidence that reveals a defendant's arrest record, depending on the nature of the act, may be deemed impermissible "other acts" evidence under Rule 404(b) of the Federal Rules of Evidence.[67] For instance, evidence that the defendant possessed an entire kilo of cocaine worth over $25,000 during the time period when he wasn't paying child support may constitute evidence of his assets and intent, but may also be ruled inadmissible by the court because of its prejudicial weight.[68] The admissibility of the evidence will depend on the nature of the evidence and its prejudicial weight, and is likely to vary between jurisdictions and even between courts in the same jurisdiction.

The evidence can give the prosecutor information about the defendant's assets and intent during the charging period even if it is not admissible at trial. This can be useful if a prosecutor is making a charging decision on a case that might be difficult but possible to prove beyond a reasonable doubt at trial. In that situation, the inadmissible evidence gives the prosecutor valuable knowl-

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[67] *See* FED. R. EVID. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

[68] This can often be cured by a stipulation between the parties that the evidence be presented to the jury in a manner that does not disclose the prejudicial information. For instance, if a defendant was convicted of drunk driving and paid a fine of $1100 during the charging period, the court can read the jury a stipulation between the parties that the defendant paid a "court fine" of $1100 during that period, without specifying the nature of the fine. In the case of the possession of large amounts of cocaine, the parties can stipulate that the jury be told that, on a specific date, the defendant was found to possess assets with an estimated value of $25,000.

edge of the defendant's guilt with an understanding that, even if the case may require more work to prove at trial, the work will be justified.

C. Other Potential Sources of Evidence

Proving that an offender had assets during a given time period may require creativity, but a person's expenditures and financial enterprises typically leave behind evidence regardless of an offender's best efforts to cover them up. For instance, if an offender is charged criminally with failure to pay child support and is held in custody at any point during the case, it can be useful to listen to recordings of that person's phone calls made from jail.[69] Despite being warned that their calls are being recorded and will be used against them, many offenders direct friends and loved ones to hire an attorney, post bail, or pay bills while the offender is incarcerated. The offender may direct his family to sell his Porsche, or to retrieve the $3,000 he has in a shoebox under his bed.

Another resource for evidence of assets is civil case filings. Some examples of local civil cases might include the following: that the offender was sued by a teeth-whitening clinic for not paying his full bill, that he took a woman to small claims court after she failed to pay him the full amount for the addition he built on her house, or that he was sued for non-payment by the company that ran his ad in their magazine. Civil case filings may generate direct evidence of assets or they may generate leads that could prove valuable with further investigation.

V. Conclusion

Failing to pay child support injures victims and our communities in ways that are just as serious, if not more so, than any other crime. Children who are not provided with proper support are subjected to harm that can cause devastating damage well into adulthood, if not an entire lifetime. When these harms are caused by one parent's deliberate choice to withhold resources from the child, this is a crime, and one that deserves society's fullest attention.

If progress is to be made toward the prevention of this act, the offenders must be held responsible. Unless and until the crime of deliberately failing to support one's child carries consequences that are as certain and serious as any other crime, offenders will continue their behavior, and society and the children will continue to pay the price. Investigating and prosecuting criminal child

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[69] For a discussion of the legality of recorded jail calls, see *Electronic Surveillance*, 41 Geo. L.J. Ann. Rev. Crim. Proc. 148, 148-75 (2012). *See also* Jessica Anderson, *Recorded Jail Phone Calls Provide Valuable Tool to Prosecutors*, Baltimore Sun (Nov. 04, 2012), http://articles.baltimoresun.com/2012-11-04/news/bs-md-co-recorded-inmate-phone-calls-20121031_1_jail-phone-murder-case-prosecutors.

support cases to their fullest will go far toward ensuring that offenders understand that they will be held accountable for their actions. Using every available source of evidence, including social media evidence, is an important step in achieving that goal.

APPENDIX A:
CHILD SUPPORT STATUTES

STATE	STATUTE	INTENT REQUIREMENT	RELEVANT STATUTORY LANGUAGE
Alabama	ALA. CODE § 13A-13-6(a)(2) (2006).	Statute contains element of "fails to exercise reasonable diligence." *Id.*	"[A] parent, guardian or other person legally charged with the care or custody of a child less than 18 years of age, fails to exercise reasonable diligence in the control of such child to prevent him or her from becoming a 'dependent child' or a 'delinquent child.'" *Id.*
Alaska	ALASKA STAT. § 11.51.120 (2012).	Statute specifies "having the financial ability to provide support or having the capacity to acquire that ability through the exercise of reasonable efforts." *Id.* § 11.51.120(f)(3)	"A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child the person knowingly fails, without lawful excuse, to provide support for the child." *Id.* "'[W]ithout lawful excuse' means having the financial ability to provide support or having the capacity to acquire that ability through the exercise of reasonable efforts." *Id.* § 11.51.120(a).
Arizona	ARIZ. REV. STAT. ANN. § 25-511 (2007).	Statute contains affirmative defense of "was unable to furnish reasonable support." *Id.* § 25-511(B).	"[A]ny parent of a minor child who knowingly fails to furnish reasonable support for the parent's child." *Id.* § 25-511(A). "The trier of fact, in determining whether the defendant has failed to furnish reasonable support, shall consider all assets, earnings and entitlements of the defendant and whether the defendant has made all reasonable efforts to obtain the necessary funds. On a showing of previous employment or lack of a physical or mental disability precluding employment, the trier of fact may infer that the defendant is capable of full-time employment at least at the federal adult minimum wage." *Id.* § 25-511(C).
Arkansas	ARK. CODE ANN. § 5-26-401 (2013).	Statute contains affirmative defense of "the defendant had just cause to fail to provide the support." *Id.* § 5-26-401(g).	"A person commits the offense of nonsupport if he or she fails to provide support to the person's . . . child who is less than eighteen (18) years of age." *Id.* § 5-26-401(a).
California	CAL. PENAL CODE § 270 (West 2008).	Statutes contain elements of "willfully" and "without lawful excuse." *Id.*	"If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child." *Id.*
Colorado	COLO. REV. STAT. § 14-6-101(1) (2013).	Statute contains element of "willfully." *Id.* Also contains affirmative defense of inability to furnish support "owing to physical incapacity or other good cause." *Id.*	"Any person who willfully neglects, fails, or refuses to provide reasonable support . . . for his children under eighteen years of age, . . . or who willfully fails, refuses, or neglects to provide proper care, food, and clothing in case of sickness for . . . such children . . . ." *Id.*

Connecticut	CONN. GEN. STAT. § 53-304(a) (2013), *available at* http://www.cga.ct.gov/current/pub/chap_946.htm#sec_53-304.	Statute has an affirmative defense of inability to furnish support "owing to physical incapacity or other good cause." *Id.*	Any person who neglects or refuses to furnish reasonably necessary support to the person's . . . child under the age of eighteen." *Id.*
Delaware	DEL. CODE ANN. tit. 11, § 1113 (2013).	Statute contains affirmative defense of inability to provide support due to "circumstances over which the accused had no control." *Id.* § 1113(d).	"A person . . . knowingly fails, refuses or neglects to provide the minimal requirements of food, clothing or shelter for that person's minor child." *Id.* § 1113(a).
District of Columbia	D.C. CODE § 46-225.02 (2013).	Statute contains element of "willfully," plus rebuttable presumption of incarceration, hospitalization, disability, or other circumstances. *Id.* § 46-225.02(a),(d).	"[A]n obligor has willfully failed to obey a lawful support order." *Id.* § 46-225.02(b).
Florida	FLA. STAT. § 827.06 (2013).	Statute contains elements of "willfully" and "has the ability" to provide support. *Id.* § 827.06(2).	Any person who willfully fails to provide support which he or she has the ability to provide to a child or a spouse whom the person knows he or she is legally obligated to support." *Id.* Statutory language recognizes: "The Legislature finds that most parents want to support their children and remain connected to their families. The Legislature also finds that while many parents lack the financial resources and other skills necessary to provide that support, some parents willfully fail to provide support to their children even when they are aware of the obligation and have the ability to do so. The Legislature further finds that existing statutory provisions for civil enforcement of support have not proven sufficiently effective or efficient in gaining adequate support for all children. Recognizing that it is the public policy of this state that children shall be maintained primarily from the resources of their parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through public assistance programs, it is the intent of the Legislature that the criminal penalties provided for in this section are to be pursued in all appropriate cases where civil enforcement has not resulted in payment." *Id.* § 827.06(1).
Georgia	GA. CODE ANN. § 19-10-1 (2012).	Statute has elements of "willfully and voluntarily." *Id.* § 19-10-1(b).	"[A]ny father or mother [who] willfully and voluntarily abandons his or her child." *Id.*

Hawaii	HAW. REV. STAT. § 709-903 (2012), *available at* http://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0709/HRS_0709-0903.htm.	Statute specifies "support which the person can provide." *Id.* § 709-903(1).	"[T]he person knowingly and persistently fails to provide support which the person can provide and which the person knows the person is legally obliged to provide." *Id.* Statutory comment specifies "The concept of 'persistent' . . . connotes repetition, obstinacy, willfulness." *Id.* § 709-903 cmt.
Idaho	IDAHO CODE ANN. § 18-401(1)-(2) (2008).	Statute contains elements of "with intent," "willfully," and "without lawful excuse." *Id.*	"Having any child under the age of eighteen (18) years dependent upon him or her for care, education or support, deserts such child in any manner whatever, with intent to abandon it; Willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children." *Id.*
Illinois	750 ILL. COMP. STAT. 16 / 15 (2013), *available at* http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2089&ChapterID=59.	Statute contains elements of "without lawful excuse" and "willfully;" language of statute specifies "ability to provide" support. 750 ILL. COMP. STAT. 16 / 15(a)(1).	"[W]ithout lawful excuse, deserts or willfully refuses to provide for the support or maintenance of his or her child or children in need of support or maintenance and the person has the ability to provide the support." *Id.*
Indiana	IND. CODE § 35-46-1-5 (2013), *available at* http://www.in.gov/legislative/ic/code/title35/ar46/ch1.pdf.	Statute contains element of "knowingly or intentionally," and affirmative defense of inability to support. *Id.*	"A person who knowingly or intentionally fails to provide support to the person's dependent child." *Id.* § 35-46-1-5(a). "It is a defense that the accused person was unable to provide support." *Id.* § 35-46-1-5(d).
Iowa	IOWA CODE § 726.5 (2013), *available at* http://search.legis.state.ia.us/nxt/gateway.dll/ic?f=templates&fn=default.htm.	Statute contains element of ability to support. *Id.*	"A person, who being able to do so, fails or refuses to provide support for the person's child or ward under the age of eighteen years." *Id.*
Kansas	KAN. STAT. ANN. § 21-5606(1) (2012), *available at* http://www.kslegislature.org/li/b2013_14/statute/021_000_0000_chapter/021_056_0000_article/021_056_0006_section/021_056_0006_k/.	Statute contains element of "without lawful excuse." *Id.*	"A parent's failure, neglect or refusal without lawful excuse to provide for the support and maintenance of the parent's child in necessitous circumstances." *Id.*
Kentucky	KY. REV. STAT. ANN. § 530.050(1)(a) (West 2006).	Statute contains element of "support which he can reasonably provide." *Id.*	"[P]ersistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide to a minor." *Id.*
Louisiana	LA. REV. STAT. ANN. § 14:74 (2012).	Statute contains element of "intentional," plus affirmative defense of physical incapacity to provide support. *Id.*	"Criminal neglect of family is the desertion or intentional nonsupport . . . [b]y either parent of his minor child who is in necessitous circumstances, there being a duty established . . . for either parent to support his child." *Id.* § 14:74(A)(1). "Physical incapacity which prevents a person from seeking any type of employment constitutes a defense to the charge of criminal neglect of family." *Id.* § 14:74(B).

Maine	ME. REV. STAT. tit. 17-A, § 552(1) (2006).	Statute contains element of ability to provide "by means of property or capacity for labor." *Id.*	"[I]f person . . . knowingly fails to provide support which he is able by means of property or capacity for labor to provide and which he knows he is legally obliged to provide to a spouse, child or other person declared by law to be his dependent." *Id.*
Maryland	MD. CODE ANN., FAM. LAW § 10-203(a) (West 2006).	Statute contains element of "willfully."	"A parent may not willfully fail to provide for the support of his or her minor child."
Massachusetts	MASS. GEN. LAWS ANN. Ch. 273, § 1(4) (2000).	Statute contains element of "wilfully and while having the financial ability or earning capacity." *Id.*	"[W]ilfully and while having the financial ability or earning capacity to have complied, he fails to comply with an order or judgment for support." *Id.*
Michigan	MICH. COMP. LAWS § 750.161(1) (2013), *available at* http://www.legislature.mi.gov/(S(iatbew]jhzmxda0jisqslme45))/mileg.aspx?page=getObject&objectName=mcl-750-161.	Statute contains element of "being of sufficient ability." *Id.*	"A person . . . being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her . . . children under 17 years of age." *Id.*
Minnesota	MINN. STAT. § 609.375 (2013), *available at* https://www.revisor.mn.gov/statutes/?id=609.375.	Statute contains affirmative defense "that the omission and failure to provide care and support were with lawful excuse." *Id.* § 609.375 subdiv. 8.	"Whoever is legally obligated to provide care and support to a spouse or child . . . and knowingly omits and fails to do so." *Id.* § 609.375 subdiv. 1.
Mississippi	MISS. CODE ANN. § 97-5-3 (1999).	Statute contains element of "willfully." *Id.*	"Any parent who shall desert or willfully neglect or refuse to provide for the support and maintenance of his or her child or children." *Id.*
Missouri	MO. REV. STAT. § 568.040 (2013), *available at* http://www.moga.mo.gov/indexnew.html.	Statute contains affirmative defense of inability to provide support for good cause. *Id.* § 568.040(3).	"[A] parent commits the crime of nonsupport if such parent knowingly fails to provide adequate support which such parent is legally obligated to provide for his or her child." *Id.* § 568.040(1).
Montana	MONT. CODE ANN. § 45-5-621 (2013), *available at* http://leg.mt.gov/bills/mca/45/5/45-5-621.htm.	Statute contains element of "support that the person can provide." *Id.* § 45-5-621(1). Also an affirmative defense of inability to support as a "result of circumstances over which the person had no control." *Id.* § 45-5-621(3).	"A person commits the offense of nonsupport if the person fails to provide support that the person can provide and that the person knows the person is legally obliged to provide." *Id.* § 45-5-621(1).
Nebraska	NEB. REV. STAT. § 28-706(1) (2013), *available at* http://nebraskalegislature.gov/laws/statutes.php?statute=28-706.	Statute contains element of intent. *Id.*	"Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide." *Id.*

Nevada	NEV. REV. STAT. § 201.020 (2011), *available at* https://www.leg.state.nv.us/NRS/NRS-201.html#NRS201Sec020; NEV. REV. STAT. § 201.051 (2011), *available at* https://www.leg.state.nv.us/NRS/NRS-201.html#NRS201Sec051.	Statute contains affirmative defense of inability to provide child support. § 201.051(1).	"[A] person who knowingly fails to provide for the support of his or her . . . [m]inor child." § 201.020(1).
New Hampshire	N.H. REV. STAT. ANN. § 639:4(I) (2007).	Statute contains element requiring the offender have the ability to provide support. *Id.*	"A person is guilty of non-support if such person knowingly fails to provide support which such person is legally obliged to provide and which such person can provide to a . . . child." *Id.*
New Jersey	N.J. STAT. ANN. § 2C:24-5 (West 2005).	Statute contains element of "willfully" and "support which he can provide." *Id.*	"A person commits a crime of the fourth degree if he willfully fails to provide support which he can provide and which he knows he is legally obliged to provide to a . . . child." *Id.*
New Mexico	N.M. STAT. § 30-6-2 (2013), *available at* http://public.nmcompcomm.us/nmpublic/ateway.dll/?f=templates&fn=default.htm.	Statute contains elements of ability and means to provide. *Id.*	"Abandonment of dependent consists of a person having the ability and means to provide for his spouse or minor child's support and abandoning or failing to provide for the support of such dependent." *Id.*
New York	N.Y. PENAL LAW § 260.05 (McKinney 2008).	Statute contains element of "without lawful excuse" or voluntary unemployment. *Id.*	"A person is guilty of non-support of a child when . . . he or she fails or refuses without lawful excuse to provide support . . . when he or she is able to do so, or becomes unable to do so, when, though employable, he or she voluntarily terminates his or her employment, voluntarily reduces his or her earning capacity, or fails to diligently seek employment." *Id.*
North Carolina	N.C. GEN. STAT. § 14-322(d) (2011).	Statute contains element of "willfully." *Id.*	"Any parent who shall willfully neglect or refuse to provide adequate support for that parent's child." *Id.*
North Dakota	N.D. CENT. CODE ANN. § 14-07-15(1) (West 2008).	Statute contains element of "willfully." *Id.*	"Every parent . . . legally responsible for the care or support of a child who wholly abandons the child or willfully fails to furnish food, shelter, clothing, and medical attention reasonably necessary and sufficient to meet the child's needs." *Id.*
Ohio	OHIO REV. CODE ANN. § 2919.21 (LexisNexis 2008).	Statute contains affirmative defense of being unable to provide support but having provided the "support that was within the accused's ability and means." *Id.* § 2919.21(D).	"No person shall abandon, or fail to provide adequate support to . . . [t]he person's child." *Id.* § 2919.21(A).
Oklahoma	OKLA. STAT. tit. 21, § 852(A) (2011).	Statute contains elements of "willfully" and "without lawful excuse." *Id.*	"[A]ny parent . . . who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, monetary child support, medical attendance, payment of court-ordered day care or payment of court-ordered medical insurance costs for such child which is imposed by law." *Id.*

Oregon	OR. REV. STAT. § 163.555 (2011), *available at* http://www.oregonlegislature.gov/bills_laws/lawsstatutes/2011ors163.html.	Statute contains affirmative defense of having a "lawful excuse" for failing to support. *Id.* § 163.555(3).	"A person commits the crime of criminal nonsupport if, being the parent . . . of a child . . . the person knowingly fails to provide support for such child." *Id.* § 163.555(1).
Pennsylvania	23 PA. CONS. STAT. § 4354(a) (2013), *available at* http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=23&div=0&chpt=43&sctn=54&subsctn=0.	Statute contains elements of "willfully" and "when the individual has the financial ability to comply." *Id.*	"An individual who willfully fails to comply with a support order . . . when the individual has the financial ability to comply with the support order commits an offense." *Id.*
Rhode Island	R.I. GEN. LAWS ANN. § 11-2-1.1(a) (West 2006).	Statute contains element of "willfully" and "having the means" to support. *Id.*	"Every person who is obligated to pay child support . . . who has incurred arrearage of past-due child support in the amount of ten thousand dollars ($10,000), and who shall willfully thereafter, having the means to do so, fail to pay three (3) or more installments of child support . . . shall be guilty of a felony." *Id.*
South Carolina	S.C. CODE ANN. § 63-5-20(A) (2012), *available at* http://www.scstatehouse.gov/code/t63c005.php.	Statute contains elements of "able-bodied," "capable of earning a livelihood," and "without just cause or excuse." *Id.*	"Any able-bodied person capable of earning a livelihood who shall, without just cause or excuse, abandon or fail to provide reasonable support to his or her . . . minor . . . child dependent upon him or her shall be deemed guilty." *Id.*
South Dakota	S.D. CODIFIED LAWS § 25-7-16 (2004).	Statute contains elements of intent and "without lawful excuse." *Id.*	"A parent of a minor child who intentionally omits without lawful excuse to furnish necessary food, clothing, shelter, medical attendance, other remedial care, or other means of support for the person's child is guilty of a Class 1 misdemeanor." *Id.*
Tennessee	TENN. CODE ANN. § 39-15-101(a) (2013).	Statute contains element of "support which that person is able to provide." *Id.*	"A person commits the crime of nonsupport who fails to provide support which that person is able to provide and knows the person has a duty to provide to a minor child." *Id.*
Texas	TEX. PENAL CODE ANN. § 25.05 (West 2011).	Statute contains element of intent. *Id.* § 25.05(a). Also contains affirmative defense of inability to provide support. *Id.* § 25.05(d).	"An individual commits an offense if the individual intentionally or knowingly fails to provide support for the individual's child." *Id.* § 25.05(a).
Utah	UTAH CODE ANN. § 76-7-201 (LexisNexis 2012).	Statute contains affirmative defense of inability to provide support, excluding voluntary unemployment or underemployment. *Id.* § 76-7-201(5)(a).	"A person commits criminal nonsupport if, having a . . . child . . . he knowingly fails to provide for the support of the . . . child." *Id.* § 76-7-201(5)(a).

Vermont	VT. STAT. ANN. tit. 15, § 202 (2013).	Statute contains element of "willfully." *Id.*	"A . . . person who, without just cause, shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her spouse and children, leaving them in destitute or necessitous circumstances or a parent who, without lawful excuse, shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her child." *Id.*
Virginia	VA. CODE. ANN. § 20-61 (2013).	Statute contains element of "willfully." *Id.*	"[A]ny parent who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her child." *Id.*
Washington	WASH. REV. CODE § 26.20.035(1) (2012), *available at* http://apps.leg.wa.gov/rcw/default.aspx?cite=26.20.035.	Statute contains elements of "able to provide support," "has the ability to earn the means to provide support" and "willfully." *Id.*	"[A]ny person who is able to provide support, or has the ability to earn the means to provide support, and who . . . [w]illfully omits to provide necessary food, clothing, shelter, or medical attendance to a child dependent upon him or her." *Id.*
West Virginia	W. VA. CODE § 61-5-29(1) (2013), *available at* http://www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=61&art=5&section=29#05.	Statute contains elements of "repeatedly and willfully," and "which he or she can reasonably provide." *Id.*	"A person who . . . [r]epeatedly and willfully fails to pay his or her court-ordered support which he or she can reasonably provide and which he or she knows he or she has a duty to provide to a minor." *Id.*
Wisconsin	WIS. STAT. § 948.22 (2), (6) (2013).	Statute contains element of intent. *Id.* § 948.22(2). Also contains affirmative defense of inability to provide support. *Id.* § 948.22(6).	"Any person who intentionally fails for 120 or more consecutive days to provide . . . child support which the person knows or reasonably should know the person is legally obligated to provide." *Id.* § 948.22(2).
Wyoming	WYO. STAT. ANN. § 20-3-101 (B)(c) (2013).	Statute contains element of intent, and "without just cause or legal excuse." *Id.* § 20-3-101(b). Also contains affirmative defense of inability to support. *Id.* § 20-3-101(C).	"Any person who without just cause or legal excuse intentionally fails, refuses or neglects to provide adequate support which the person knows or reasonably should know the person is legally obligated to provide to a child." *Id.* § 20-3-101(b).

FACEBOOK NOTIFICATION – YOU'VE BEEN SERVED: WHY SOCIAL MEDIA SERVICE OF PROCESS MAY SOON BE A VIRTUAL REALITY

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I. INTRODUCTION

You have one new Facebook[1] message: You've been served. The last thing an individual thinks of when logging into his or her Facebook account or any other social media account is suddenly becoming part of a potentially expensive and time-consuming litigation. The rapid and powerful advances in digital technology and social media specifically, however, have created the possibility that service of process via social media—including service on social

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[1] FACEBOOK, https://www.facebook.com (last visited Oct. 30, 2013).

media platforms such as Facebook and Twitter[2]—may become a common and useful occurrence.

Imagine you are going about your day and you decide to check your Facebook account to see what information Facebook's News Feed[3] will provide about your friends' latest adventures.[4] Many times, the globe icon on your Facebook browser will be highlighted, indicating you have new notifications. What could the notification be? Perhaps someone commented on your exciting new photo, perhaps someone liked your witty status update, or perhaps you were just invited to the hottest bash of the summer. Think for a moment, however, if the notification instead informed you that you have been served legal documents, and it either attached those documents or directed you to a page with documents such as a summons and complaint. Specifically, imagine you opened up your new Facebook message and it was from a process server, informing you that you have been served, and the message attachments were a summons and complaint. This scenario may not seem as crazy as some individuals may think. Many people have likely heard of scenarios where a process server uses a unique tactic to serve legal papers upon individuals, such as in the middle of a concert[5] or even at a baseball game.[6] Several international courts and parties have already become acclimated to service of legal papers via social

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[2] TWITTER, https://twitter.com/ (last visited Oct. 30, 2013).

[3] *What is News Feed?*, FACEBOOK, http://www.facebook.com/help/210346402339221 (last visited Oct. 30, 2013). According to Facebook, News Feed is the center column of a Facebook user's home page and "is a constantly updating list of stories from people and Pages that you follow on Facebook. News feed stories include status updates, photos, videos, links, app activity and likes." *Id.*

[4] Chances are this will not be the only time you check your Facebook account during the day. According to a recent study, smart phone users check Facebook nearly 14 times a day. *How Many Times a Day Do You Check Facebook From Your Smart Phone?*, PAC. BUS. NEWS (Honolulu, Haw.) (Mar. 29, 2013, 6:19AM), http://www.bizjournals.com/pacific/blog/morning_call/2013/03/how-much-time-do-you-really-spend-on.html. On average these smart phone users spend thirty minutes a day on Facebook. *Id.* These numbers are not just eye-opening; they are important to the issue of social media service of process because they show that people frequently log on to social media platforms such as Facebook, making it more likely—although not a certainty—that an attempt to serve an individual through Facebook will be successful.

[5] Ashley Majeski, *Singer Ciara Gets Served Legal Papers in Middle of Concert*, TODAY (June 10, 2013, 5:43 PM), http://www.today.com/entertainment/singer-ciara-gets-served-legal-papers-middle-concert-6C10272130. While headlining the 2013 Los Angeles Gay Pride Festival, singer Ciara was handed legal papers by an audience member near the front of the stage as Ciara was performing a song. *Id.*

[6] Tim Bontemps, *Red Sox Pitcher Served Papers by Yankees Fan Before Start*, N.Y. POST (Sept. 20, 2011, 10:46 PM), http://nypost.com/2011/09/20/red-sox-pitcher-served-papers-by-yankees-fan-before-start/. A few hours before he was scheduled to pitch for the Boston Red Sox, "pitcher Erik Bedard was served with papers from the Massachusetts Probate and Family Court in a child support case." *Id.*

media; and with U.S. courts now starting to grapple with the issue, this method of service appears to be on the horizon.

The purpose of this Article is to examine service of process in the U.S. via social media platforms such as Facebook, Twitter, and LinkedIn. The concept of serving legal papers via social media may be unconventional in U.S. jurisdictions, but it is not uncommon to foreign jurisdictions. After listing instances where international courts authorized social media service of process, this Article will examine some recent U.S. federal lawsuits where social media service of legal papers was contemplated and, in certain circumstances, allowed. These recent lawsuits may provide a basis for future U.S. courts to "greenlight" social media service of process under the right circumstances. Indeed, some states have contemplated social media service of process and one state recently proposed legislation to that effect, which this Article then examines. Given the recent attention to social media service of process, this Article provides recommendations to follow when seeking to utilize service of process via social media and why it may be more effective than most realize. While social media service of process is far from the accepted practice in U.S. courts, under the right circumstances, it may be an appropriate—and perhaps the only—method of locating an individual, to move a lawsuit forward and ensure the defendant—and justice—is served.

II. International Courts Embrace Service of Process via Social Media

A. *Under the Proper Circumstances*

While social media service of process is a new concept to many U.S. courts (and likely confusing to courts with little knowledge of how social media works[7]), such process has been allowed numerous times in international courts in a variety of ways. These examples provide a framework of the factual cir-

[7] Indeed, in the well known Occupy Wall Street action involving the subpoena of a Twitter account, *People v. Harris*, the Court noted:

> In dealing with social media issues, judges are asked to make decisions based on statutes that can never keep up with technology. In some cases, those same judges have no understanding of the technology themselves. Judges must then do what they have always done—balance the arguments on the scales of justice. They must weigh the interests of society against the inalienable rights of the individual who gave away some rights when entering into the social contract that created our government and the laws that we have agreed to follow. Therefore, while the law regarding social media is clearly still developing, it can neither be said that this court does not understand or appreciate the place that social media has in our society nor that it does not appreciate the importance of this ruling and future rulings of courts that may agree or disagree with this decision.

cumstances under which social media service of process in U.S. courts is appropriate. An international sampling of social media service of process includes:

- In December 2008, an Australian Capital Territory Supreme Court judge allowed for service of court documents via Facebook.[8] Defendants Carmel Rita Corbo and Gordon Poyser failed to keep up with payments on the $150,000 loan they took out from mortgage provider MKM Capital ("MKM").[9] The defendants ignored emails from MKM's law firm and did not attend an October 3, 2008, court appearance.[10] The defendants' Facebook profiles, meanwhile, provided the defendants' date of birth, email addresses, and list of Facebook "friends," and the defendants were Facebook "friends" with one another.[11] Such information satisfied the court that Facebook was an acceptable means of communicating with the defendants.[12] In allowing for service of process via Facebook, the judge did stipulate that the papers be sent via private message so that other individuals who visited the Facebook page could not read the contents of the legal papers.[13]
- Even the remedy of injunctive relief is no stranger to social media service of process. In October 2009, a United Kingdom High Court served an injunction on an anonymous Twitter user via Twitter.[14] The issue first arose after an unknown Twitter user began tweeting at @blaneysblarney, which was the name of conservative blogger Donal Blaney's blog.[15] Blaney, an attorney, decided to ask for court intervention rather than seeking Twitter's help.[16] Blaney's own experience with Twitter in trying to remove a fake Twitter account for a client left him with the impression that Twitter was slow to address the issue and even ignored his demand letters.[17] As a result,

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People v. Harris, 949 N.Y.S.2d 590, 597 (N.Y. Crim. Ct. 2012) (footnote omitted) (citation omitted).

[8] Bonnie Malkin, *Australian Couple Served with Legal Documents via Facebook*, TELEGRAPH (U.K.) (Dec. 16, 2008, 11:42 AM), http://www.telegraph.co.uk/news/newstopics/howaboutthat/3793491/Australian-couple-served-with-legal-documents-via-Facebook.html.

[9] *Id.*

[10] *Id.* Additionally, one of MKM's lawyers stated that the defendants were not available at their residence and no longer worked at their last known place of employment, per certain documents. *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *High Court Serves Injunction via Twitter*, TELEGRAPH (U.K.) (Oct. 1, 2009, 6:38PM), http://www.telegraph.co.uk/technology/twitter/6252166/High-Court-serves-injunction-via-Twitter.html.

[15] Catherine Mayer, *Injunction by Twitter: Stopping a Web Impostor*, TIME (Oct. 3, 2009), http://www.time.com/time/world/article/0,8599,1927554,00.html.

[16] *Id.*

[17] *Id.*

at 6:30 p.m. on October 1, 2009, in response to Blaney's petition, the English High Court sent a direct message on Twitter to the impostor @blaneysblarney: "You are hereby ordered by the High Court of Justice to read and comply with the following order."[18] The message included a link to a web page with the demand to desist from the misleading tweets and by clicking on the link the unknown impostor's personal IP address may be ascertained.[19] This was the first known injunction delivered via Twitter.[20]

- In February 2012, United Kingdom High Court Judge Nigel Teare allowed legal documents to be served via Facebook.[21] Plaintiffs AKO Capital LLP and AKO Master Fund brought a $2.1 million claim against their broker TFS Derivatives ("TFS"); one of its employees, Fabio De Biase; and former AKO Capital LLP employee, Anjam Ahmad.[22] TFA served its claim on Mr. De Biase at his last known address, but with questions as to whether he was still living there, asked the court to allow service via Facebook.[23] Judge Teare questioned whether TFS could verify the subject Facebook account was actually Mr. De Biase's, and whether he checked it.[24] The court ultimately approved service of process via the Facebook account when it heard that Mr. De Biase was Facebook friends with other TFS employees and the account appeared active because Mr. De Biase had recently accepted a few Facebook friend requests.[25]

Therefore, service of process via social media is not an entirely unheard of concept after receiving authorization in foreign courts.[26] The above examples

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Joanna Stern, *You've Been Served. . . Via Facebook*, ABC NEWS (Feb. 23, 2012, 11:58AM), http://abcnews.go.com/blogs/technology/2012/02/youve-been-served-via-facebook/.

[22] Katherine Rushton, *Legal Claims Can Be Served Via Facebook, High Court Judge Rules*, TELEGRAPH (U.K.) (Feb. 21, 2012, 11:56 AM), http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/9095489/Legal-claims-can-be-served-via-Facebook-High-Court-judge-rules.html (The investment managers claim that TFS Derivatives overcharged commission and sought to recover those funds from the broker. TFS Derivatives denied the allegations and then claimed that if it was held liable, it should be entitled to recover some of the subject funds from defendants Ahmad and De Biase).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] At the same time, however, even in the international realm, allowing service of legal process via social media is not a given. In a recent case, rapper Tramar Dillard, better known as Flo Rida, was about to avoid a lawsuit after being served papers via Facebook. Zayda Rivera, *Flo Rida Avoids Lawsuit After Being Served Papers on Facebook*, NEW YORK DAILY NEWS (Aug. 20, 2013, 12:58 PM), http://www.nydailynews.com/entertainment/music-arts/flo-rider-avoids-legal-sanctions-served-papers-facebook-article-1.1431745. Flo Rida allegedly no showed a headliner spot at a 2011 Australian music festival despite being paid $377,000 up front. *Id.* When concert

provide evidence for U.S. courts and lawmakers that social media service of legal documents is possible and may be appropriate under the right circumstances.

III. U.S. Legal Authority Warms Up to Service of Process via Social Media

Recently, U.S. courts—at least those situated in New York—have shown a willingness to consider, if not accept, service of process via social media as well as other legal documents under the right circumstances. The proceeding cases could help open the door for more courts to endorse service of process via social media (either as a stand-alone method of service or in conjunction with other forms of service like email) or service of other legal documents via social media after a party has already appeared.

A. Fortunato v. Chase Bank USA, N.A. *Considers Service of Process via Social Media*

In 2012, the Southern District of New York considered service of process via social media and, while not outright endorsing such a method of service, showed some willingness to consider such a unique method and shined some attention on the issue. In *Fortunato v. Chase Bank USA, N.A.*,[27] the Southern District of New York considered defendant Chase Bank USA, N.A.'s ("Chase") motion to extend time to complete service of a third-party complaint and for authorization to serve the third-party defendant using alternate methods, one of which was via Facebook.[28] Plaintiff Lorri J. Fortunato ("Lorri") alleged in an amended complaint that someone fraudulently opened a Chase credit card account in her name and then racked up debt on the account without her authorization or knowledge.[29] Chase then started collection proceedings for the unpaid debts against Lorri on March 4, 2009, by executing service of process at an address in Carmel, New York, an address Lorri claimed to have never lived

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promoters sued Flo Rida and his management for claims including breach of contract, however, the promoters looked to Facebook because of service challenges. *Id.* In September 2012, a Justice ruled in favor of social media service of legal papers due to difficulties in serving Flo Rida personally, but Flo Rida's attorneys appealed, claiming the summons was not validly served and the judge lacked the jurisdiction to serve the summons via Facebook. *Id.* A Justice upheld Flo Rida's appeal, stating "[t]he evidence did not establish, other than by mere assertion, that the Facebook page was in fact that of Flo Rida and did not prove that a posting on it was likely to come to his attention in a timely fashion." *Id.*

[27] Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *1 (S.D.N.Y. June 7, 2012).

[28] *Id.*

[29] *Id.*

at.[30] After obtaining a default judgment against Lorri, Chase started proceedings to garnish her wages on May 24, 2010, eventually satisfying the full default judgment amount.[31] In the subject action, Lorri brought claims against Chase for violating the Fair Credit Reporting Act, conversion, and abuse of process.[32]

Relevant to the service of process via social media issue, after granting Chase's motion to transfer the case from New York Supreme Court to the Southern District of New York, the court granted Chase leave to implead Lorri's daughter, Nicole Fortunato ("Nicole"), into the action.[33] Chase alleged in a November 30, 2011, third-party complaint that Nicole opened the Chase credit card account in Lorri's name, listed her own Carmel, New York, address in the credit card application, and then charged the $1,243.09 that was eventually garnished from Lorri's wages.[34] In attempting to serve Nicole, Chase hired an investigator but was unable to find her or her address of residence.[35] As a result, Chase sought the court's approval for service of process via Facebook, email, publication, and delivery to Lorri.[36]

The court noted that New York Civil Practice Law and Rules ("CPLR") Section 308(5) allows for service "in such manner as the court, upon motion without notice, directs" where traditional methods of service are "impracticable."[37] The court added that service under CPLR Section 308(5) requires the impracticability showing "but does not require proof of due diligence or of actual prior attempts to serve a party under the other provisions of the statute."[38] The court noted that Chase's process server made several attempts to

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* (Chase brought claims against Nicole for indemnification, breach of contract, contribution, fraud, unjust enrichment, and account stated.) *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* (internal quotation marks omitted). In discussing service of process, the court wrote that under New York CPLR 308:

> In New York, service of process may be effected by: (1) personal service; (2) delivery to "a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served" and mail; (3) service on an agent; or (4) so-called "nail and mail" service.

Id.

[38] *Id.* This point pursuant to the New York statute may be important for future instances where social media service of process is considered. In theory (in New York at least), a party does not have to show that traditional methods of service of process failed before seeking social media service of process.

serve Nicole at an address in Shandaken, New York, to no avail.[39] Chase then hired an investigator to find Nicole, whose search included social media websites.[40] Among the investigator's findings[41] was what she believed to be Nicole's Facebook profile, which listed a personal email address and a residence in Hastings, New York.[42] Since the court was satisfied that normal service methods were impracticable under CPLR Section 308,[43] the Court had to decide on an alternate service method. In doing so, the court noted that "[c]onstitutional due process requires that service of process be 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' "[44]

The court held that it could not agree with Chase that service of process via private Facebook message, email to the Facebook email address, and delivery of the summons and complaint to Lorri were "all reasonably calculated to notify Nicole of these proceedings."[45] The court noted that Facebook service of process "is unorthodox to say the least" and it was not aware of any other court authorizing such a method for service of process.[46] The court also expressed its concern with proper authentication and differentiated Chase's request from cases where email service was allowed because a movant presented at least some facts to indicate the person to be served would likely receive the summons and complaint at the target email address.[47] The court held here that Chase failed to "set forth any facts that would give the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by Nicole or that the email address listed on the Facebook profile is

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[39] *Id.* at *2 (The process server tried to serve Nicole once on January 19, 2012; twice on January 25, 2012; and twice on January 26, 2012. The process server reported "there were 'no obvious signs that the premises were being regularly accessed.' ").

[40] *Id.* The investigator also searched the Department of Motor Vehicles records, New York State Department of Corrections records, voter registration records, and publicly accessible wireless phone provider records. *Id.*

[41] The investigator found four possible addresses for Nicole: the aforementioned Shandaken address, a Patterson, New York address that did not actually exist, a Wingdale, New York address which actually belonged to Lorri, and a Newburgh, New York address that Nicole did not own. *Id.*

[42] *Id.*

[43] *Id.* The court noted the numerous attempts at personal service, the diligent search for an alternate residence, plus "Nicole's history of providing fictional or out of date addresses to various state and private parties . . . ." *Id.*

[44] *Id.* (alteration in original) (quoting Philip Morris USA Inc. v. Veles Ltd., No. 06 Civ. 2988(GBD), 2007 WL 725412, at *2 (S.D.N.Y. Mar. 12, 2007)).

[45] *Id.*

[46] *Id.*

[47] *Id.*

operational and accessed by Nicole."[48] The court voiced its concern further by noting that "anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the Nicole Fortunato the investigator found is in fact the third-party defendant to be served."[49]

Having denied social media service of process directly, the court then considered alternate service of process via publication, under CPLR section 316(a).[50] The court noted that Chase wanted to serve Nicole by publishing notice in a local newspaper in Hastings, New York—where the Facebook profile at issue lists Nicole's location—and in the *New York Times*.[51] While the court wrote that under the circumstances, "a local newspaper [was] the most likely means by which to apprise Nicole of the third-party complaint,"[52] it reiterated its concern about the true owner of the Nicole Fortunato Facebook profile.[53] Ultimately, the court authorized service of the third-party complaint via publication in local newspapers not only in Hastings, New York—the location in the Nicole Fortunato Facebook profile—but in local newspapers in the four other cities the Chase investigator believed Nicole may be living.[54]

The decision in *Fortunato* was interesting for several reasons. First, the court questioned the authenticity of the Facebook profile, which suffered from an apparent lack of sufficient information to authenticate it as Nicole's. However, additional facts confirming the authenticity of the social media account—what if, for example, Nicole and Lorri were Facebook "friends" or had messaged one another on Facebook before the lawsuit began, as many family members do—may have warmed the court to service of process via Facebook. Furthermore, while the court denied Chase's application to serve the third-party complaint via email, Facebook, and other methods,[55] it did grant alternate service by publication and, in doing so, allowed for a service method that relied on information *obtained* from social media. Specifically, the court gave some def-

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[48] *Id.*

[49] *Id.* The court added that, given Lorri and Nicole's estrangement, it was "similarly skeptical that delivery of the summons and complaint to Lorri is reasonably calculated to apprise Nicole of the proceedings against her." *Id.* at *3.

[50] *Id.* The court noted that CPLR section 316(a) "provides for service by publication 'in two newspapers, at least one in the English language, designated in the order as most likely to give notice to the person to be served, for a specified time, at least once in each of four successive weeks.'" *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* The court noted that the Nicole Fortunato Facebook profile's Hastings, New York location was at least fifty miles away from the four addresses Chase's investigator found when searching for Nicole. *Id.*

[54] *Id.* These cities were Shandaken, Patterson, Wingdale, and Newburgh, New York. *Id.*

[55] *Id.*

erence to the investigator's findings that the Nicole Fortunato Facebook profile contained a location in Hastings, New York, and incorporated that location into the five locations for service via publication.[56] In some regard then, service of process was at least impacted by social media.

While the court in *Fortunato* held that "a local newspaper [was] the most likely means by which to apprise Nicole of the third-party complaint,"[57] many would argue that service of the third-party complaint via Facebook message would actually be more likely to apprise Nicole Fortunato than a local newspaper. Many people would agree that these days, the chance that an individual checks his or her Facebook profile is much higher than the chance that the same individual reads the newspaper, much less a *local* newspaper. Ironically, if the individual did read the newspaper, they may read from an internet browser or by clicking on a post in their Facebook news feed rather than by thumbing through the local newspaper in its printed paper form. Indeed, research shows that young adults, for example, see news on social networking sites nearly 2.5 times more than young adults who read a newspaper in print or digital format.[58] The trend thus appears to be that individuals will eventually be more likely to be apprised of a lawsuit on social media platforms than in print newspapers. In any regard, *Fortunato* shed light on the possibility of service of process via social media, even if its holding meant that social media service was not quite ready for the spotlight.

B. F.T.C. v. PCCare247 Inc. *Allows for Service of Motions and Other Post-Complaint Documents via Social Media*

Service of process via social media received additional "notice," so to speak, when the Southern District of New York again tackled the issue in *F.T.C. v. PCCare247 Inc.*[59] While service of a summons and complaint via social media was not directly at issue this case, *F.T.C.* helped advance the con-

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[56] *Id.*

[57] *Id.*

[58] *In Changing News Landscape, Even Television is Vulnerable*, PEW RES. CENTER FOR PEOPLE & PRESS (Sept. 27, 2012), http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/. Specifically, "[a]mong adults younger than age 30, as many saw news on a social networking site the previous day (33%) as saw any television news (34%), with just 13% having read a newspaper either in print or digital form." *Id.* Among the other interesting findings from the survey which would support social media service: only 23% of Americans said they read a print newspaper the day before, down from 47% in 2000; 55% of New York Times readers read the paper on a computer or mobile device, while only 41% read the print edition; and 19% of the public said they saw news or news headlines on social networking sites the day before in 2012, up from 9% in 2010. *Id.*

[59] FTC v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013).

cept of service of process via social media and provided additional groundwork for future courts to allow this method of service of process.

In *F.T.C. v. PCCare247 Inc.*, the plaintiff, the Federal Trade Commission ("FTC"), moved for leave to serve documents other than the summons and complaint by alternative service—Facebook and email—on several defendants located in India.[60] The FTC brought the action alleging that the defendants ran a scheme that operated largely out of Indian call centers and tricked American customers into spending money to fix computer problems that were not real.[61] The five India-based defendants were allegedly centrally involved with the scheme.[62] After the court entered a temporary restraining order enjoining the defendants' business and freezing some of their assets, the FTC then submitted the summons, complaint, and other documents to the Indian Central Authority for service on the defendants pursuant to Federal Rules of Civil Procedure ("FRCP") 4(f)(1) and The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Convention").[63] Notably, a process server personally delivered the summons and complaint to all five of the defendants—although the Indian Central Authority had yet to serve the defendants via the Convention—and the defendants even retained counsel for a preliminary injunction hearing.[64] The defendants then failed to comply with the preliminary injunction terms, but on January 3rd, and 6th, of 2013, defendant Vikas Agrawal emailed the FTC four times and blind carbon copied the court chambers' email address.[65] Then on February 11, 2013, the FTC filed the instant motion and served the defendant via email and overnight mail.[66]

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[60] *Id.* at *1.

[61] *Id.*

[62] *Id.* Vikas Agrawal was the scheme's mastermind and ran daily operations, Anuj Agrawal also played a key role in daily operations, and Parmeshwar Agrawal was a director of one of the corporate defendants and created a PayPal account for it. *Id.* The two corporate defendants in India were PCCare247 Solutions Pvt. Ltd. and Connexxions IT Services Private Limited. *Id.*

[63] *Id.* The FTC sent the documents by email, Federal Express, and personal service via a process server as well. *Id.*

[64] *Id.* at *1-2. Although the court exempted certain assets from being frozen in issuing a preliminary injunction on November 16, 2012 so the defendants could pay their attorneys, the defendants still did not pay their attorneys and on January 14, 2013, the court granted the attorneys' motions to withdraw as counsel. *Id.* at *2.

[65] *Id.* at *2.

[66] *Id.* The court issued an Order on March 1, 2013 directing the FTC to file a supplementary letter with specifics about the proposed service such as which emails, social media accounts, and publications the FTC wanted to use. *Id.* In the March 5, 2013 supplementary letter, the FTC noted the costs of service by publication and thus narrowed its request to first attempt service via email and Facebook. *Id.* at *3.

The court first analyzed the applicable legal standard for service of process on a party in a foreign country.[67] Next, the court considered whether international agreement prohibited service of process via email and Facebook.[68] Noting that service of process via Facebook is outside the scope of Article 10 of the Convention, India did not object to service of process via Facebook, and the court was not aware of any international treaty prohibiting service of process via Facebook, the court held that international agreement did not prohibit service via email and Facebook.[69] The court then analyzed whether service of process via email comports with due process, holding that such service is "reasonably calculated to provide [the] defendants with notice of future filings in this case."[70] After examining service of process via email and determining it would comport with due process,[71] the court turned its attention to the FTC's proposal to serve the defendants via Facebook.[72]

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[67] *Id.* at *2-3. The court noted that under FRCP 4(f)(3), "a Court may fashion means of service on an individual in a foreign country, so long as the ordered means of service (1) is not prohibited by international agreement; and (2) comports with constitutional notions of due process." *Id.* at *2 (quoting SEC v. Anticevic, No. 05 CV 6991(KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009)) (internal quotation marks omitted). The court added that under FRCP 4(f), "service of process on foreign corporations may be made in the same manner as on individual defendants." *Id.*

[68] *Id.* at *3. The court noted that the U.S. and India are signatories to the Convention. Article 10 of the Convention allows for alternative methods of service so long as the destination state has no objection to such methods. *Id.* While India has not objected to the means listed in Article 10, such an objection is limited to the methods actually enumerated in Article 10, and thus a court acting under FRCP 4(f)(3) is free to order alternative methods of service not specifically referenced in Article 10. *Id.* at *4. Service via email and Facebook are not listed in Article 10, nor has India specifically objected to them, the court noted. *Id.*

[69] *Id.* at *4. The court therefore held that it could authorize service via email and Facebook so long as due process was also satisfied. *Id.*

[70] *Id.* The court noted, "[c]onstitutional notions of due process require that any means of service be 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at *4 (quoting SEC v. Anticevic, No. 05 CV 6991(KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009)) (internal quotation marks omitted).

[71] *Id.* The court noted that service via email alone comports with due process where a plaintiff can show the email will likely reach the defendant. *Id.* The defendants in *F.T.C.* had an internet business and frequently used email to communicate. *Id.* The court noted that the FTC identified each individual defendant's email address and said email addresses were "used for various tasks involved in the alleged scheme . . . ." *Id.* Furthermore, the court had "independent confirmation that at least one of these email accounts was recently in use by the specified defendant" as Vikas Agrawal used the subject email address to email the court four times on January 3 and 6, 2013. *Id.* As a result, the court held that the FTC "demonstrated a high likelihood that defendants will receive and respond to emails sent to these addresses. Service by email alone, therefore, would comport with due process." *Id.*

[72] *Id.* at *5.

According to the court, the FTC's Facebook service of process method was to send a Facebook message to each individual defendant's Facebook account and attach the relevant documents.[73] The defendants would then be able to view the messages the next time they logged into Facebook and, as the court noted, "depending on their settings, might even receive email alerts upon receipt of such messages."[74] The court noted that if the FTC had proposed to serve the defendants only via Facebook, "a substantial question would arise whether that service comports with due process."[75] The court then cited to the *Fortunato* court's concerns about authenticating whether the Facebook account actually belongs to the defendant.[76] The court found that the FTC set forth facts that supplied "ample reason for confidence that the Facebook accounts identified are actually operated by defendants."[77] Anuj and Parmeshwar Agrawal each registered their Facebook accounts using the email addresses previously noted and Vikas Agrawal registered his Facebook account with the same email address used to register iConnexxions.com, a website key to the defendants' alleged scheme.[78] Also of note, Vikas and Anuj Agrawal listed on Facebook their job titles at the defendant companies as their professional activities and both are Facebook "friends" with Parmeshwar Agrawal.[79] Therefore, the FTC "demonstrated a likelihood that service by Facebook message would reach defendants."[80]

The court acknowledged the "relatively novel concept" of Facebook service and the chance that the defendants "will not in fact receive notice by this means."[81] The court noted, however, that the proposed Facebook service was "intended not as the sole method of service, but instead to backstop the service upon each defendant at his, or its, known email address."[82] The court added that "history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service of process via technological means of then-recent vintage, rather than dismissing

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[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id. See also supra* note 49 and accompanying text.

[77] *PCCare247 Inc.*, 2013 WL 841037, at *5.

[78] *Id.*

[79] *Id*. Interestingly, the weight the court places on the two individual defendants listing their job titles at the defendant companies as professional activities in their Facebook profiles would give credence to a future plaintiff attempting service via another digital platform known for listing an individual's job title and calls itself the "world's largest professional network"–LinkedIn. LinkedIn, http://www.linkedin.com/ (last visited Oct. 30, 2013).

[80] *PCCare247 Inc.*, 2013 WL 841037, at *5.

[81] *Id.*

[82] *Id.*

them out of hand as novel."[83] The court noted that alternative service methods are "all the more reasonable where, as here, the defendants demonstrably already have knowledge of the lawsuit."[84] The court therefore held that the FTC's proposal to serve the defendants by email and Facebook satisfied the due process inquiry, noting that "[w]here defendants run an online business, communicate with customers via email, and advertise their business on their Facebook pages, service by email and Facebook together presents a means highly likely to reach defendants."[85] The court added that its intervention was warranted and the litigation must move forward and cannot wait five months or more for every motion to be served by the Indian Central Authority, which had until now not shown a disposition to act.[86] The court ultimately granted the FTC's motion to serve the defendants via email and Facebook and granted the FTC leave to serve "motions and other post-complaint documents" to the defendants' specified email addresses and by message to each of the individual defendants' Facebook accounts.[87]

While *PCCare247 Inc.* may not have been a ringing endorsement of social media service of process, it did help advance the concept of allowing for such alternative service on a more regular basis. Critics may point to the court's emphasis in *PCCare247 Inc.* that alternative service was proposed via *both* email—already an accepted method by many courts—and Facebook, and the court's concern that a Facebook-only service of process would raise questions about due process.[88] Furthermore, *PCCare247 Inc.*'s, extenuating circumstances of service—defendants in another country and an Indian Central Authority that was not quick to respond[89]—likely helped warrant an alternative service method such as service of process via Facebook more so than usual. Even further, the defendants in *PCCare247 Inc.* at one point were represented

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[83] *Id.* at *5. The court added that "[a]s the Ninth Circuit has stated, the due process reasonableness inquiry 'unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance.'" *Id.* (quoting Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002)).

[84] *Id.* at *5.

[85] *Id.* at *6. The trend towards digital business and social media means that many companies, including those whose services do not necessarily occur over the internet, nonetheless "run an online business [and] communicate with customers via email." Furthermore, whether by listing a company somewhere in his or her Facebook profile or uploading content that somehow includes or references a company, an individual is thus likely to "advertise their business on their Facebook page" and thus future parties will likely have an easier time analogizing the facts of their particular case to this one in some aspects. *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at *5.

[89] *Id.* at *6.

by counsel,[90] thereby alleviating a typical social media service concern that the party to be served is not properly apprised of the litigation.

On the other hand, the court *did* authorize service of process via Facebook in this case for post-complaint documents. The *PCCare247 Inc.* decision may thus give parties additional recourse where a party initially appears but then is difficult to contact—except via social media. Therefore, *PCCare247 Inc.* may actually expand the acceptable grounds for service of process via social media. Furthermore, *PCCare247 Inc.* offered valuable insight into additional means of authentication for a social media account that would alleviate a court's concerns about due process. Among other things, a party seeking to use social media for service of process should consider presenting the court with facts such as: (i) the target defendant's social media account references an email address that is traceable to the defendant or was part of the underlying facts of the action; (ii) the target defendant's social media account lists a job title or other professional activity that is connected to another defendant; and (iii) multiple target defendants are connected in some way on a social media platform, such as Facebook "friends," Twitter "followers," or LinkedIn "connections."[91] While time will tell if, and how, courts warm up to social media service, *PCCare247 Inc.* was a step forward in this direction.[92]

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[90] *See supra* text accompanying note 64.

[91] *See supra* notes 78-79 and accompanying text.

[92] Interestingly, the pro-social media service of process vibe *PCCare247 Inc.* offered took a slight speed bump but was eventually re-affirmed and further developed just months later in 2013. In *F.T.C. v Pecon Software Ltd.*, the Southern District of New York considered the FTC's motion for leave to serve documents including a summons and complaint via alternative methods – including Facebook once again – on defendants in five related cases, which were also related to *PCCare247 Inc.* FTC v. Pecon Software Ltd, Nos. 12 Civ. 7186 (PAE), 2013 WL 4016272, at *1 (S.D.N.Y. Aug. 7, 2013). Of relevance here, the court considered the FTC's proposal to serve several defendants via Facebook message. *Id.* at 8. In the related *Pecon Software Ltd.* case, the FTC sought to serve four individual defendants via Facebook message and "[t]o verify that the Facebook accounts at issue correspond to these four defendants, the FTC has compiled a table summarizing the information that its investigator obtained from Facebook." *Id.* In denying the FTC"s motion to serve these four defendants via Facebook without prejudice to renew, the court held:

> However, unlike in *PCCare247*, the FTC has not supplied the Court with actual screenshots of the defendants' Facebook pages. Many of the individual defendants in these cases bear common names. At times, the email addresses used by the individual defendants have varied, as have the corporate entities with which the defendants have identified. Thus, although the Court has no reason to question the sown declaration of the FTC's investigator, the Court cannot say with confidence, without actually viewing the Facebook pages and verifying the information allegedly listed thereon, that service by Facebook message would be highly likely to reach defendants.

Id.

IV. Legislative Progress Towards Service of Process via Social Media

In addition to courts slowly gravitating towards service of process via social media under the right circumstances, some states have proposed legislation or procedures that would allow for social media service of legal documents. Utah state courts, for one, appear to acknowledge the value of social media service of process, under the right circumstances. In discussing service of process, the Utah state courts website specifically references social media.[93] Utah notes that the Utah Rules of Civil Procedure ("URCP") 4 governs service of process and that "[c]ourt rules require that the defendant or respondent be

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As far as another related case, *F.T.C. v. Marczak*, No. 12 Civ. 7192 (PAE), the court denied without prejudice the FTC's motion to serve an individual, Wahid Ali, by Facebook message. *Id.* The court noted that while the "FTC represents that Ali registered his Facebook account with the same email addresses that he used to set up PayPal accounts used in the alleged scheme . . .the Court cannot find verification on the record that Ali used these email addresses." *Id.* at *8. Accordingly, the court's ruling in *Pecon Software Ltd.* showed the importance of verifying information (or providing sufficient means for a court to do so) when seeking social media service. *Id* A moving party is wise is to consider that in addition to stating the relevant social media information for service purposes, that it provide "actual screenshots" of the subject party's social media page in order for a court "verify[ ] the information allegedly listed thereon." *Id.* at 8.

Just over a month later, the Southern District of New York once again considered Facebook service for numerous defendants and this time reached a decision that again confirms that under the proper circumstances, social media service of process may be a viable option. In *F.T.C. v Pecon Software Ltd.*, the FTC again moved for leave to serve documents, including a summons and complaint, on defendants not only in the above-referenced cases, but in the *PCCare247, Inc.* action as well. FTC v. Pecon Software Ltd., Nos. 12 Civ. 7186 (PAE), 2013 WL 5288897, at *1 (S.D.N.Y. Sept. 18, 2013). As to the *PCCare247, Inc.* action, the FTC sought to serve Anuj Agrawal, Parmeshwar Agrawal, PCCare247 Solutions Pvt. Ltd. and Connexxions IT Services Private Limited with the summons and complaint by email and Facebook message. *Id.* The court held that "[j]ust as service of post-complaint documents was appropriate, service with the Summons and Complaint is appropriate at the same email addresses identified." *Id.* As to Prateek Shah, a defendant, the FTC was granted leave to serve him by Facebook message and email where the facts included: Shah listing on his Facebook page Pecon Software Limited as his employer and his father Mahesh Shah, another Pecon director. *Id*. At to Shah's father, the FTC's obtaining six email addresses via investigative demands from Facebook, and the email address domain names being consistent with employment and school information listed on Shah's Facebook account and in other sources. *Id.* at *2.

As for Wahid Ali, this time around, the court allowed service via Facebook message and email where in part: Ali used two of the email addresses to register a PayPal account and Facebook accounts that were part of the alleged scheme, Ali's Facebook page listed one of the entities allegedly in the scheme as his employer, and "the email addresses associated with Ali's Facebook account match[ed] the addresses [previously] identified." *Id.* Therefore this case and its related actions eventually advanced the concept of social media service and also identified additional considerations – such as providing a court with visual evidence such as Facebook page screenshots – for a party to consider in seeking approval for social media service. *Id.*

[93] *Serving Papers (Service of Process)*, Utah St. Cts., http://www.utcourts.gov/howto/service/service_of_process.html (last updated May 17, 2013).

notified about the case, get copies of all the papers you file, and be given time to respond."[94] URCP 4(d)(4) covers "other Service" and states:

> Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means.[95]

The Utah state courts website states that "[i]f you cannot find the person to be served after using reasonable diligence, or if you can show the court that the person is avoiding service, you can ask permission to serve the complaint and summons (or other document required to be served under URCP 4) by some other means."[96]

Notably, the Utah state courts website also enters into a somewhat detailed discussion of alternative service methods, including social media. The Utah state courts website states:

> The alternative means chosen has to be the method most likely to give actual notice of the document being served. Serving someone by publishing the summons in a newspaper has been for many years the most common means of alternative service. However, the courts are more frequently using electronic communications and social media to publish the complaint and summons or to notify the person being served that the documents have been published.
>
> Even though you cannot find the person to be served, you may know where they accept communications: email; mail to a friend or relative; a social network, such as Facebook; a text

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[94] *Id.*

[95] UTAH R. CIV. P. 4(d)(4)(A) (West 2013). Section 4(d)(4)(B) further states:

> If the motion is granted, the court shall order service of process by means reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.

Id. 4(d)(4)(B).

[96] *Serving Papers (Service of Process)*, *supra* note 93.

> number or phone number; or a Twitter name. With the court's permission, you might be able to send the complaint and summons directly to the person by mail, email or social media.[97]

The Utah state courts website even references Facebook and Twitter and states that with court authorization, service of process via social media is possible.[98] The Utah state courts website acknowledges social media service of process as a potentially viable means of service and may serve as an example to apprise parties of the availability of such a method for service of process going forward.

Of further interest, the state of Texas recently tried to take service of process via social media one step further and explicitly allow for this method of service in its laws. In February 2013, Texas Republican Jeff Leach proposed a bill that would allow lawsuits in Texas to be served via social media where traditional service methods fail.[99] Rep. Leach introduced Texas House Bill 1989 ("H.B. 1989"), which would authorize courts to approve social media service where regular methods such as hand-delivery or registered mail are unsuccessful.[100] The text of H.B. 1989 is as follows:

> Sec. 17.031. SUBSTITUTED SERVICE THROUGH SOCIAL MEDIA WEBSITE.
>
> (a) If substituted service of citation is authorized under the Texas Rules of Civil Procedure, the court may prescribe as a method of service under those rules an electronic communication sent to the defendant though a social media website if the court finds that:

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[97] *Id.* The website adds:

> Because you are a party to the case, the court might order that a third person serve the documents and file proof of service on your behalf. For alternative service, this might mean the third person would mail or email the documents on your behalf, post the documents to a Facebook account, arrange for publication, or notify the person by phone or text that the documents have been published. *Id.*

[98] *Id.* There are a number of forms on the Utah state courts website that are required in order to ask the court for service via alternative methods, some of which reference social media directly. *Id.* For example, the Statement Supporting Motion for Alternative Service states in paragraph (6) that "I believe that the probability of actual notice is improved by communicating to the above-named person by:" and then lists "Social Network (such as Facebook) at _____ (name)" and "Twitter at _____ (name)", in addition to "Text message" and "Phone." STATEMENT SUPPORTING MOTION FOR ALTERNATIVE SERVICE, UTAH ST. CTS. 3 (2010), *available at* http://www.utcourts.gov/howto/service/docs/02_Statement_Supporting_Alternative_Service.pdf.

[99] Jess Davis, *Texas Bill Would Let Suits Be Served Via Facebook, Twitter*, LAW360 (Feb. 28, 2013, 4:33 PM), http://www.law360.com/articles/419406/texas-bill-would-let-suits-be-served-via-facebook-twitter.

[100] *Id.*

(1) the defendant maintains a social media page on that website;
(2) the profile on the social media page is the profile of the defendant;
(3) the defendant regularly accesses the social media page account; and
(4) the defendant could reasonably be expected to receive actual notice if the electronic communication were sent to the defendant's account.

(b) Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this section.[101]

H.B. 1989 is another step forward in social media service of process and embraces the concept. The proposed bill allows for social media service of process where traditional methods are unsuccessful—a running theme where social media service has previously been allowed versus allowing for such service as a first option—and lists a number of factors that are required for substitute social media service.[102] Of course, one must get beyond the obvious first point, whether a defendant has a social media profile, to reach the more challenging second requirement—authenticating that the social media profile actually belongs to the right party[103]—which is perhaps the central concern of courts grappling with social media service of process. While H.B. 1989 does not delve into detail about authenticating a social media profile, a party seeking to serve legal documents should present multiple factors that confirm the social media account is likely that of the defendant. The frequency with which a defendant accesses his or her social media account is listed as the third factor a court should find[104] and is important because a court is likely to be apprehensive about authorizing social media service if the otherwise authentic account has not been accessed by the party in some time. A party could verify the frequency of a defendant's social media use by observing newly-posted pictures, videos, news articles (with dates), or other posts on an individual's timeline. If such information is set behind a privacy wall, even an individual's

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[101] Jeff Leach, *Bill: H.B. 1989*, TEX. LEGISLATURE ONLINE, http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/HB01989I.pdf#navpanes=0 (last visited Oct. 30, 2013). Section 2 of the proposed bill states that it takes effect on September 1, 2013. *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

profile picture could shed light on how recently a defendant accesses his or her social media account.[105]

The final factor, that "the defendant could reasonably be expected to receive actual notice if the . . . communication were sent to the defendant's account,"[106] may be the most open-ended of the factors. In theory, if the defendant has an account and regularly accesses it, he or she would be likely to receive actual notice of a social media service of process on his or her account. While there may be no exact method to showing a reasonable expectation of receiving actual notice of service of process via social media, presenting detailed and abundant evidence regarding a specific social media account is likely to help allay a court's concerns. The ultimate fate of H.B. 1989 aside,[107] this proposed legislation is another step towards U.S. courts accepting social media service of legal papers under the right circumstances. Other states are likely to follow suit in the future.

V. Best Practices for Service of Process via Social Media

In light of recent legal authority trending towards authorizing service of process via social media, what are the takeaways for a party seeking to utilize this unique service method? A party who cannot locate a defendant by conventional methods or investigation should consider several factors when seeking service of process via social media, assuming the defendant's alleged social media account can be found. It is critical for a party to gather ample evidence to assure a court that there is a strong likelihood that the targeted social media account belongs to the defendant and the defendant will receive the summons and complaint or other legal documents. A checklist of items a party should consider when requesting service of process via social media includes:

A. Authentication of a Social Media Account via Content

One common saying for social media professionals is "content is king," and such a saying has added meaning when considering social media service of process. A party seeking to assure a court that a social media account belongs to a hard-to-find defendant may potentially have a treasure trove of facts and information to present to a court to help authenticate an account. On Facebook,

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[105] For example, the individual's profile picture could be a picture from a recent birthday or even from a recent event–such as a concert or vacation–that can be verified to a certain date. If the individual has changed his or her profile picture several times recently, that is also evidence of regular access to the social media account.

[106] Leach, *supra* note 96.

[107] According to the Texas Legislature Online, H.B. 1989 failed. Jeff Leach, *Bill: HB 1989*, Tex. Legislature Online, http://www.capitol.state.tx.us/BillLookup/BillStages.aspx?LegSess=83R&Bill=HB1989 (last visited Oct. 30, 2013).

for example, a search of an individual's profile may yield information such as photos, videos, relationship status, birthday, hometown, current city, education, work, languages spoken, and websites, to name a few.[108] Of course, if an individual has a unique name, the chances of finding what is believed to be the right profile will be easier than if an individual's name is something like "John Smith." Regardless, the more publicly available information[109]—which depends on what information an individual makes available on a specific social media platform—to verify that the social media account likely belongs to the target defendant, the more likely a court will be convinced that service of process via social media will reach the targeted defendant.[110]

B. Putting the "Social" in Social Media Helps

In conjunction with finding and inspecting an individual's available social media content, a court may be put at further ease with respect to service of process via social media if there is evidence that the target social media account has recently, and frequently, been in use.[111] To the extent an individual's social media account is publicly visible, such as a Facebook profile timeline, it could reflect recent activity. For example, an individual may have recently attended an event (whose date can be independently verified), posted pictures from a recent event or even posted a news article that can at least give an indication of the last time the individual accessed the account. Any such information can complement social media account authentication by showing that the target individual actively uses his or her social media account, thereby increasing the chances that he or she will receive social media service of process and any corresponding documents.

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[108] *See generally* FACEBOOK, https://www.facebook.com (last visited Oct. 30, 2013).

[109] *See What's Considered Public Information?*, FACEBOOK, http://www.facebook.com/help/167709519956542 (last visited Oct. 30, 2013). There is always the possibility that an individual who is difficult to find has also made his or her social media account similarly difficult to find or examine. However, certain information for each social media platform is considered "public information" and is more likely to be accessible even if one is not "friends" or otherwise connected to the target individual. For example, on Facebook, public information may include items one shares on his or her timeline, including "name, gender, username, user ID . . . profile picture, cover photo and networks." *Id.* Ironically, Facebook's rationale for why such information is "available to anyone" includes statements such as "Your name, profile picture and cover photo help people recognize you" and "Listing your networks (such as your schools or workplace) allows others to find you more easily." *Id.* Thus, a social media platform like Facebook is designed to allow people to be found more easily, and such a rationale should be offered to any court when requesting social media service of process.

[110] FTC v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013).

[111] Davis, *supra* note 99.

C. Social Media Account Authentication via Email and Messages

As the court in *PCCare247 Inc.* showed, tying an individual's email address to a particular social media account, if possible, can be useful in confirming the social media account belongs to the correct individual.[112] If a moving party can show, as in *PCCare247 Inc.*, that an individual's social media account was registered with an email address used to previously communicate with the court or the moving party or was perhaps used in the underlying facts in the action, this may help authenticate the social media account for service of process purposes.[113] Furthermore, certain social media platforms, such as Facebook, may actually allow one, under certain circumstances, to see if the target individual read the message containing legal documents.[114] Accordingly, a party trying to convince a skeptical court to use social media service of process could attempt to further allay the court's concern by stipulating that in order for social media service to be considered effective by the court, the party must receive a notification from the social media platform that the message has actually been seen—almost the equivalent of a "social media affidavit of service" created by the social media platform itself.[115]

D. Friendliness and Connections Helps

A party seeking social media service of process can additionally authenticate a social media account by showing that the account has Facebook "friends," Twitter "followers," or LinkedIn "connections," to name a few possibilities, that are easily tied to individuals or companies. For example, if a Facebook profile believed to be that of the potential defendant has "friends" that include other potential co-defendants,[116] prospective witnesses, or other parties in litigation, this added level of connectivity may reduce the likelihood,

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[112] *Id.*

[113] *Id.* In some cases, a party may have already communicated with the defendant via a social media account prior to instituting the lawsuit. Such evidence should be presented to authenticate the account for service purposes.

[114] *Sending a Message*, FACEBOOK, http://www.facebook.com/help/316575021742112/#!/help/326534794098501/, (last visited Oct. 30, 2013). For example, Facebook's Help Center states in response to the question of "How do I know if a friend has seen a message I sent?" that "When someone sees your most recent message, it will be marked as seen. That way, you always know who got the message, and who didn't." *Id.* At the same time, however, there is always the concern that a social media user will not see a message. Indeed, Facebook's Help Center also states that one "can send messages to anyone on Facebook as well as to email addresses. Messages you send to people you're not connected to may arrive in their Other folder." *Id.*

[115] Such a proposal to use a "social media affidavit of service" could be offered in conjunction with information authenticating that the social media account belongs to the correct individual to be served.

[116] *PCCare247 Inc.*, 2013 WL 841037, at *5.

in a court's eyes, that the social media account is fake or belongs to the wrong individual.

There are many potential avenues and sources of information that a party could conceivably find to convince a court that social media service of process or social media service of post-complaint documents would not run amok of due process or of state and federal laws. Indeed, it is conceivable that social media platforms themselves could get involved in the service of process business, under the right circumstances. Facebook, for example, states that "[m]essages you send to someone you're not connected to on Facebook may arrive in their Other folder. You may have the option of paying to route these messages to their inbox. When this delivery option is available, you'll see the price beneath your message."[117] Accordingly, some social media platforms may already have the functional equivalent of a digital process server in place, complete with payment options. As a theoretical example, Twitter could one day become a method of publication rather than newspapers.[118] Users searching for an individual or company to serve could utilize hashtags such as #service, #serviceofprocess, or #SOP and even use Promoted Tweets[119] to increase the odds of giving an individual or company proper notice of a lawsuit. While those theoretical scenarios could be remote in reality, the point is that social media has provided new and innovative methods for communication and spreading ideas and messages. There is no reason why, under the proper circumstances and with the proper consideration of a prospective party's rights, that the legal system cannot utilize social media to offer quicker, cheaper, and more efficient methods of dispensing justice.

VI. CONCLUSION

Social media service of process is an exciting yet frightening prospect. On one hand, it offers a new, quicker, and cheaper method of service than standard forms of service, such as personal service, or more costly alternative methods, such as publication. If the trending technology and times is such that individuals increasingly communicate and send information digitally and specifically via social media, then many will wonder why the courts should not keep up

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[117] *Sending a Message*, *supra* note 114.

[118] Maureen Farrell, *Peter Thiel: Twitter Will Outlast the New York Times*, CNNMONEY (May 1, 2013, 12:00 AM), http://money.cnn.com/2013/05/01/investing/twitter-thiel-andreessen/index.html (PayPal co-founder Peter Thiel stated in a debate in 2013 that Twitter has a brighter future than the New York Times).

[119] *Promoted Tweets*, TWITTER, https://business.twitter.com/products/promoted-tweets-full-service (last visited Oct. 30, 2013). In describing its Promoted Tweets service, Twitter notes that the benefits include "[g]et[ing] your most important Tweets in front of the right people" and "[t]arget[ing] Twitter users by keywords in timeline, interest, geography and device." *Id.*

with the times. Even the *PCCare247 Inc.* court noted in analyzing social media service of process that "courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel."[120]

On the other hand, the speed and ease with which social media service of process is possible, coupled with the cloak of individual anonymity still available on many social media platforms, no doubt raises issues about whether such a novel service method would be sufficient for due process purposes. While courts are still grappling with incorporating social media into the legal process, a cautious yet open approach that considers all information available via a specific social media account and the extent to which authentication is possible seems prudent. This way, even in social media's infant stages, the legal system can utilize the benefits of social media while best safeguarding against its potential dangers, and ensure justice is served, one Facebook message or Tweet at a time.

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[120] *PCCare247 Inc.*, 2013 WL 841037, at *5.

Anonymity in Social Media

Laura Rogal, Esq.*

I. Introduction

On July 5, 1993, *The New Yorker* published a now-infamous cartoon by Peter Steiner: a dog sitting at a computer, along with the caption "On the Internet, nobody knows you're a dog."[1] This seemingly innocuous statement appears to have marked a turning point in the history of the Internet. Nowadays, not only do Internet users know if you are a dog, they know what breed you are, your lineage, your age, what you ate for breakfast, lunch, and dinner,

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[1] Sue Cockburn, *Is Social Media Just a Passing Fad?*, Ezinearticles, http://ezinearticles.com/?Is-Social-Media-Just-A-Passing-Fad?&id=6547282 (last visited Oct. 25, 2013).

what treats you prefer, what toys you don't destroy, and when you last went outside to do your business. It is safe to conclude that the days of Internet anonymity have long since passed.

In an effort to diminish the amount of data mining that proliferates on the Internet, many people look to the next-best thing to mask their identity: the pseudonym[2]. With the ever-increasing popularity of social media[3], and the lack of identity verification by social media sites,[4] the ability to be anonymous online is growing at a rapid rate.

The battle over having a "real" online identity has been going on as long as the Internet has been around. Even the earliest forms of social media allowed, and even required, its users to create a username instead of using their legal name.[5] It seems that many social media sites actually *encourage* the anonymity of their users through the registration process. The suggestion of a username as opposed to a real name indicates that social media sites want their users to be known as something other than their true identities.

Social media has become the dominant medium of interaction over the past twenty years. According to The Pew Research Center's Internet & American Life Project, as of May 2013, 72% of adults use social networking sites.[6] Of the twenty most-visited websites by Internet users in the United States, nearly half are social media sites.[7] Facebook has 1.11 *billion* active, monthly users, with an average of 665 million unique users logging in to the site each day.[8] Twitter has 500 million users, 200 million of which are active users that create more than 400 million tweets each day.[9] Over 1 *billion* unique users visit You-

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[2] Pseudonym is defined as "a fictitious name used by an author to conceal his or her identity." *Pseudonym Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/pseudonym (last visited Oct. 25, 2013).

[3] There is no generally accepted definition as to what constitutes a "social media" site.

[4] Viktoria Michaelis, *Defamation of Character on Social Networking Sites*, EZINEARTICLES (Oct. 15, 2012), http://ezinearticles.com/?Defamation-of-Character-on-Social-Networking-Sites&id=7333824.

[5] Although there is not a consensus as to the "first" social media site, Geocites, founded by Beverly Hills Internet in 1994, was the first widespread website for social interaction. *The Brief History of Social Media*, UNIV. OF N.C. AT PEMBROKE, http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html (last visited Oct. 25, 2013).

[6] Joanna Brenner, *Pew Internet: Social Networking*, PEW INTERNET & AM. LIFE PROJECT (Aug. 5, 3013), http://pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx.

[7] *Top Sites in United States*, ALEXA, http://www.alexa.com/topsites/countries/US (last visited Oct. 25, 2013).

[8] *Facebook Reports First Quarter 2013 Results,* FACEBOOK INVESTOR RELATIONS (May 1, 2013), http://investor.fb.com/releasedetail.cfm?ReleaseID=761090. Number of users estimated in March of 2013. *Id.*

[9] Karen Wickre, *Celebrating #Twitter7*, TWITTER BLOGS (Mar. 21, 2013, 7:42 UTC), https://blog.twitter.com/2013/celebrating-twitter7; *Twitter Reaches 500 Million User Mark*, WASH. POST,

Tube monthly, and they watch over 6 *billion* hours of video while they are on the site.[10] The user bases of other sites such as LinkedIn, Pinterest, Google+, Instagram, and Tumblr are also continuing to explode.[11] Social media is not a fad;[12] but rather, a burgeoning source of legitimate communications that will continue to be utilized through various mediums and for various purposes.

This Article will focus on the adoption of pseudonyms in social media and the legal viability of any such usage. It will begin with a retrospective of the right to anonymous speech in the United States, and will then discuss the conflict between those historical rights and the current necessity to unmask anonymous authors who use their anonymity to commit torts. Finally, it will conclude with a tutorial on how to determine the identity of anonymous authors in litigation through the standards identified by various courts within the United States, and how to avoid running up against the immunities put in place by the Communications Decency Act.

II. History of Right to Free Speech and Speaking Anonymously

A. *Free Speech is What This Country Was Built On*

For Americans, the right to free speech is axiomatic. The First Amendment of the Constitution states, in relevant part: "Congress shall make no law . . . abridging the freedom of speech."[13] Indeed, "The expression of one's opinion is absolutely protected by the First and Fourteenth Amendments to the U.S. Constitution. . . .Under the First Amendment there is no such thing as a false idea. . .Thus, [h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[14] The concept of freedom of speech is ingrained in American society. The Internet should not take that concept away, but instead, expand and encourage it.

B. *Anonymous Speech is a Pillar of the First Amendment*

Before the Founding Fathers wrote the Constitution, they recognized the importance of being able to speak anonymously and found the use of pseud-

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http://articles.washingtonpost.com/2012-07-30/business/35488395_1_public-tweets-twitter-users-user-mark (last visited Oct. 25, 2013).

[10] *Statistics*, YouTube, http://www.youtube.com/yt/press/statistics.html (last visited Oct. 25, 2013).

[11] *See Top Sites in United States*, *supra* note 7.

[12] Sue Cockburn, *Is Social Media Just a Passing Fad?*, Ezinearticles (Sept. 7, 2011), http://ezinearticles.com/?Is-Social-Media-Just-A-Passing-Fad?&id=6547282.

[13] U.S. Const. amend. I.

[14] AMCOR Inv. Corp. v. Cox Ariz. Publ'ns, Inc., 764 P.2d 327, 329-30 (Ariz. Ct. App. 1988).

onyms to be powerful tools in political debate.[15] The Federalist Papers, a series of 85 essays written and published between October 1787 and May 1788, were anonymously written under the name "Publius," though we now know John Jay, Alexander Hamilton, James Madison were the authors.[16]

Due to an innate understanding of the intricate relationship between speaking anonymously and speaking freely, numerous courts have found that the First Amendment also protects the right to anonymous speech.[17] The United States Supreme Court has held that the First Amendment to the United States Constitution protects a person's right to speak anonymously.[18]

The rationale behind allowing anonymous speech is simple. Courts wish to avoid the chilling effect that would occur if anonymous authors were unmasked simply because someone did not like or agree with what was said. Across the country, courts have analyzed the bounds of the right to anonymous speech and have affirmed its value by: striking down an ordinance requiring identification permits to engage in door-to-door political advocacy;[19] prohibiting a law requiring initiative petition circulators to wear identification badges;[20] striking down a law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature;[21] and by invalidating a statute prohibiting the distribution of "any hand-bill in any place under any circumstances" that did not contain the name and address of the person who prepared it, reasoning that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[22] Through these holdings, the courts have made their intention of unequivocally upholding the First Amendment perfectly clear.

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[15] *See About the Federalist Papers*, LIBR. OF CONGRESS, http://thomas.loc.gov/home/histdox/abt_fedpapers.html (last visited Oct. 25, 2013).

[16] *Id.*

[17] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom protected by the First Amendment.").

[18] Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 199-200 (1999).

[19] Watchtower Bible & Tract Soc'y of N.Y, Inc. v. Vill. of Stratton, 536 U.S. 150, 167-68 (2002).

[20] *Buckley*, 525 U.S. at 200.

[21] *McIntyre*, 514 U.S. at 357 (holding that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority.").

[22] *Id.* at 357; Talley v. California, 362 U.S. 60, 63, 65 (1960).

C. *With the Evolution of the Internet, the Right to Anonymous Speech Continues to be Protected in New Forums*

How does the First Amendment right to anonymous speech relate to social media? Easily. The concept of the "username", while prevalent in email addresses and early-adopted instant messaging programs, reached its critical mass with the advent of social media. Social media sites do not always simply *suggest* that their users create an online persona; in most instances, they *require* it upon initial registration.[23] It may come as somewhat of a surprise that these social media logins actively encourage usernames to be creative, unique, and something other than the user's individual email address; however, utilizing a pseudonym on social media is nothing new for Internet users.

Social media users are entrenched in the anonymity of usernames.[24] It has been suggested that the Internet may be the "greatest innovation in speech since the invention of the printing press[.]"[25] As one court explained it, "[t]he rapid growth of Internet communication and Internet commerce has raised novel and complex legal issues and has challenged existing legal doctrine in many areas."[26] "The near universal use of pseudonyms in e-mail and instant messages has fostered a culture in which users are freed to say and do things they never would by offline means."[27] By using a screen name, an anonymous user "is able to create an entirely new persona for his Internet communications, based on the distinction that '[u]nlike real space, cyberspace reveals no self-

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[23] *See, e.g.*, *What Are Usernames?*, FACEBOOK, https://www.facebook.com/help/www/211813265517027 (last visited Oct. 25, 2013) (explaining "What are usernames?" in the context of Facebook); *The Twitter Glossary*, TWITTER, https://support.twitter.com/articles/166337-the-twitter-glossary# (last visited Oct. 25, 2013) (defining "Username" for Twitter purposes); *Alternate Usernames*, GOOGLE, https://support.google.com/accounts/answer/70206?hl=en&ref_topic=2373945 (last visited Oct. 25, 2013) (explaining that alternate Google account usernames, including a "nickname," can be created).

[24] In August of 2013, a search on Google for "creative username generator" produced more than 668,000 results. A number of the results were websites that create usernames for social media sites based on input from the user. *See generally*, GOOGLE, https://www.google.com/#q=creative+username+generator (last visited Aug. 5, 2013). For example, on May 31, 2013, Duvamis social network launched as a social media site, which guarantees anonymity from both other users of the site, as well as the site operators. *See What Is Duvamis?* DUVAMIS, http://duvamis.com/newvision/about.html (last visited Oct. 25, 2013); Michael del Castillo, *Anonymous Founders of Anonymous Social Network Speak Out*, UPSTART BUS. J. (June 24, 2013, 12:01 AM), http://upstart.bizjournals.com/companies/startups/2013/06/24/anonymous-duvamis-founders-speak.html?page=all.

[25] Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 88 (2000).

[26] Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001).

[27] Elizabeth A. Ritvo et al., *Online Forums and Chat Rooms in Defamation Actions*, COMM. LAW., Summer 2006, at 1, 23 (quoting Polito v. AOL Time Warner, No. Civ. A. 03CV3218, 2004 WL 3768897, at *3 (Pa. Ct. C.P. Jan. 28, 1994)).

authenticating facts about identity.'"[28] While the vast majority of Internet users judiciously utilize their ability to speak anonymously, an unfortunate minority hide behind a pseudonym for evil instead of good. Those evils can include using a pseudonym to defame, harass, bully, or infringe upon their intellectual property rights of others. Fortunately, a number of courts have taken a proactive stance regarding the crossroads of freedom of speech and the Internet.

The U.S. Supreme Court extended the protections of the First Amendment to speech on the Internet as early as 1997.[29] Other courts have followed that path, explaining that "[t]his ability to speak one's mind [on the Internet] without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate."[30] Another court likened anonymous Internet speech to the Federalist papers, explaining that such speech "can become the modern equivalent of political pamphleteering."[31] Users of social media embrace this philosophy.

This freedom to speak anonymously on the Internet is enhanced by the fact that "even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes."[32] A commentator analyzing Reddit, a social media site, explained that the site's anonymity and use of pseudonyms "has the odd effect of prompting users to be very intimate and remarkably candid."[33] For speech purposes, a dog using social media can be anything it wishes to be.

III. Conflicting Policies Present-Day of Free Speech Versus Identification

Although the courts readily uphold the right to speak anonymously, the right to do so is not absolute.[34] Given the history of the United States, it is no

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[28] Jennifer O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745, 2745-46 (2002) (quoting Lawrence Lessig, Code and Other Laws of Cyberspace 33 (1999).

[29] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[30] *See, e.g.*, Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

[31] Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).

[32] Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 896 (2000).

[33] David Carr, *Left Alone by Its Owner, Reddit Soars*, N.Y. Times, Sept. 3, 2012, at B1, *available at* http://www.nytimes.com/2012/09/03/business/media/reddit-thrives-after-advance-publications-let-it-sink-or-swim.html.

[34] Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *see also In re* Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011).

surprise that political speech receives the highest level of protection.[35] At the other end of the freedom spectrum is commercial speech, which enjoys "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,"[36] but only if the speech is "neither misleading nor related to unlawful activity."[37] Types of speech such as defamation,[38] obscenity,[39] and fighting words remain completely unprotected.[40] When contesting speech, the type of speech determines the level of protection courts will afford.

In the context of a conflict between anonymous authors' First Amendment rights and the ability of tort victims to unmask anonymous speakers, courts have engaged in a wary balancing act between the two interests.[41] These courts have acknowledged that they must strike a balance "between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendant[ ]."[42] As a result, the identity of an anonymous speaker may be disclosed during discovery to protect a litigant's legitimate interest in vindicating a legal right in court.[43] Finding this balance is a difficult, often puzzling process, which varies depending on the type of injury alleged.[44]

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[35] Meyer v. Grant, 486 U.S. 414, 420, 425 (1988) (describing the First Amendment protection of "core political speech" to be "'at its zenith.'").

[36] Bd. of Trustees v. Fox, 492 U.S. 469, 477 (1989).

[37] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

[38] Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002).

[39] Roth v. United States, 354 U.S. 476, 483 (1957).

[40] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[41] Mobilisa Inc. v. Doe, 170 P.3d 712, 717 (Ariz. Ct. App. 2007) (recognizing "victims of wrongful internet communications should be able to seek legal redress unimpeded by wrongdoers' attempts to hide behind an unwarranted shield of First Amendment rights" and citing extensive authority for premise).

[42] Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

[43] *See* Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240, 249 (4th Cir. 2009) (reasoning that revealing Doe Client's identity provides the defendant a fair opportunity to defend oneself in court).

[44] Solers, Inc. v. Doe, 977 A.2d 941, 952 (D.C. 2009) (explaining "one size does not necessarily fit all" when it comes to the test utilized to expose an anonymous speaker).

IV. Court-Created Procedures on How to Identify an Anonymous Author and Related CDA Issues With Anonymous Author Publications

People regularly reach out to the courts for judicial intervention to obtain the "real" identity of Internet users.[45] Despite the inclination of courts to facilitate the identification of anonymous social media users, they are constrained by Federal and common law. Courts, along with social media users and litigants, should be aware of the limitations placed on the judiciary regarding the unmasking of a social media accountholder's identity.

A. Communications Decency Act[46]

In 1996, Congress passed the Communications Decency Act ("CDA"), which was intended to "promote unfettered speech on the Internet."[47] The CDA accomplishes that goal by creating "a federal immunity to any cause of action that would [otherwise] make service providers liable for information originating with a third-party user of the service."[48] Congress enacted the CDA "to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce."[49] The CDA states: "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."[50]

In short, the CDA protects from liability (1) a provider of an interactive computer service; (2) whom a plaintiff seeks to treat as a publisher; and (3) of information provided by another information content provider.[51] CDA immunity applies unless the "interactive computer service" also functions as an "information content provider," in connection with the statements at issue in the underlying litigation.[52] This language is critical to courts' in the application of defamation law to online postings, and in the utilization of the Courts to obtain information regarding anonymous authors.

The CDA preempts inconsistent state laws. Specifically, one provision states, "[n]o cause of action may be brought and no liability may be imposed

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45 *See* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 161 (D. Mass. 2008).

46 Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560-61 (2006).

47 Zeran v. Am. Online, Inc., 129 F.3d 327, 334 (4th Cir. 1997).

48 *Id.* at 330.

49 Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003).

50 47 U.S.C. § 230(c)(1) (2006).

51 Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

52 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (internal quotation marks omitted).

under any State or local law that is inconsistent . . .."[53] As the California Supreme Court has explained, the CDA provides website operators, including social media sites, with broad immunity for claims based on publishing material authored by one of the website's users.[54]

"[W]ell-settled precedent [provides] that the CDA is a complete bar to suit against a website operator for his or her 'exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content.' "[55] The Ninth Circuit has explained that courts should carefully construe the CDA in favor of immunity to ensure the prompt dismissal of meritless cases unless there is clear evidence that a website directly participated in the creation of unlawful content:

> We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content. Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. *Such close cases, we believe, must be resolved in favor of immunity*, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged-or at least tacitly assented to-the illegality of third parties. . . . *[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles*.[56]

Additionally, "[c]ourts across the country have repeatedly held that the CDA's grant of immunity should be construed broadly"[57] because the CDA's "provi-

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[53] Green v. Am. Online, 318 F.3d 465, 470 (3rd Cir. 2003) (quoting 47 U.S.C. § 230(e)(3) (2006)).

[54] Barrett v. Rosenthal, 146 P.3d 510, 516-17 (Cal. 2006); *see also* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (explaining "Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties.") (footnotes omitted).

[55] Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 932 (D. Ariz. 2008) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

[56] *Fair Hous. Council*, 521 F.3d at 1174-75 (emphasis added) (citation omitted).

[57] Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 699-700 (S.D.N.Y. 2009) (citing Universal Commc'n Sys. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007)) ("reviewing cases and holding 'we too find that Section 230 immunity should be broadly construed.' "); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998)).

sions set up a *complete shield* from a defamation suit for an online service provider, *absent an affirmative showing that the service was the actual author of the defamatory content*.[58]" Thus, any cause of action "that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."[59] Given a plaintiff's inability to seek relief against a website where an anonymous author's content is published, a person seeking to identify the author of tortious content must then utilize alternative methods to gain information regarding the identity of the author.

B. Website Liability for Intellectual Property Claims

It is undisputed that the CDA expressly carves out any claims against a website pertaining to intellectual property issues.[60] This helps prevent anonymous authors from creating a permanent veil over their identity simply because they have committed some form of violation of an intellectual property right. Whether a claim arises out of trademark infringement or copyright infringement will affect whether liability can attach to the website which is hosting the infringing content, and how to identify the anonymous author.

1. Trademark Infringement

Anonymous Internet users can easily infringe on an intellectual property owner's trademark by simply inserting a trademark into web content to divert Internet traffic. Because users can anonymously own domain names, trademark infringement can occur by an unidentified user as well, thereby necessitating discovery of the website owner's identity through other means.

"To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1114, a party 'must prove: (1) that it has a protectable ownership interest in the mark; and (2) that the defendant's use of the mark is likely to cause consumer confusion.' "[61] When examining the consumer confusion component of this test, courts look to eight factors as an adaptable proxy:
(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of

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[58] Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E–mail Defamation,* 84 A.L.R. 5TH 169, § 2[a] (2000) (emphasis added).

[59] *Fair Hous. Council*, 521 F.3d at 1170-71; *see also* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009) (citing *Fair Hous. Council*, 521 F.3d at 1170).

[60] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting in part Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1322 (11th Cir. 2006)) ("[T]he CDA does not clothe service providers in immunity from 'law[s] pertaining to intellectual property.' ").

[61] Lanham Act, 15 U.S.C. § 1051 (2006); Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting in part Dep't of Parks & Recreation v. Bazaar Del Mundo, Inc., 448 F.3d 1118, 1124 (9th Cir. 2006)).

goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines.[62]

Courts have found that consumers on the Internet apply different levels of scrutiny depending on the circumstances. This "[i]nitial interest confusion in the internet context derives from the unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder's goodwill."[63] Because of the blatant nature of trademark infringement, coupled with the lack of a legitimate legal interest in infringing on a party's trademark, courts have been far more willing to uncover an anonymous trademark infringer than in any other context.

2. Copyright Infringement

Beginning in the 1980s, Internet users would publish copyright-protected materials online in various locations, including electronic bulletin boards.[64] Third-party users would then copy and download the published works from those websites.[65] Advances in technology have allowed the piracy of copyright protected materials to proliferate; for example, in 1998 Internet users downloaded approximately three million copyright-protected recordings per day.[66] New technology continued to emerge, allowing users to publish large volumes of copyright-protected materials, including video and musical recordings, and to allow other Internet users to download those materials. Despite a number of courts shutting down these processes in 2001 and 2002,[67] emergent technologies continue to allow anonymous Internet users to exchange copyright-protected materials with other anonymous Internet users.

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[62] AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979) (the "*Sleekcraft* factors.").

[63] Austl. Gold, Inc. v. Hatfield, 436 F.3d 1228, 1239 (10th Cir. 2006); *see also* Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1018-19 (9th Cir. 2004) (holding that initial interest confusion occurs when a defendant uses a plaintiff's trademark in a way calculated to capture a consumer's attention and divert the consumer to the defendant's own website); Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 814 (7th Cir. 2002) (affirming the grant of a preliminary injunction preventing the defendant from using the plaintiff's trademark as a metatag in the defendant's website); Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036, 1061-65 (9th Cir. 1999) (holding that the defendant's use of a trademark in a website's metatags allowed the defendant to benefit improperly from the goodwill associated with the mark); Gov't Emps. Ins. Co. v. Google, Inc., 330 F. Supp. 2d 700, 701, 706 (E.D. Va. 2004) (holding that the auction of trademarked terms to the highest bidder states a cause of action under the Lantham Act).

[64] *In re* Charter Commc'ns, Inc., 393 F.3d 771, 773 (8th Cir. 2005).

[65] *Id.*

[66] *Id.*

[67] *See* A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1099 (9th Cir. 2002); A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001).

Copyright infringement is clearly not speech that is entitled to First Amendment protection.[68] However, some courts have held that Internet users have a limited First Amendment privacy interest in anonymous Internet usage, including "the use of [peer-to-peer] file copying networks to download, distribute, or make available for distribution copyrighted" material in electronic form.[69] In the context of copyright infringement, that same court explained that, "[p]arties may not use the First Amendment to encroach upon the intellectual property rights of others."[70] Thus, courts tasked with determining whether to quash a subpoena for an anonymous Internet subscriber's identifying information, typically apply the same or similar standards as they would in evaluating a claim for defamation arising under the First Amendment.[71]

Through the Digital Millennium Copyright Act of 1998 (the "DMCA"),[72] a party who believes their copyright protected material has been infringed by an anonymous Internet user can request that a subpoena be issued to the ISP that is hosting the infringing content.[73] Even use of a DMCA subpoena does not insulate the requesting party from the impact of the protection afforded by an Internet user's First Amendment rights. The DMCA does not warrant enforcement of a subpoena in violation of the First Amendment. In fact, numerous courts have granted motions to quash subpoenas seeking information regarding alleged copyright infringers because it would violate the user's right to free speech.[74]

C. Unmasking Anonymous Authors Through the Courts

While the posters of anonymous content enjoy the protections their pseudonyms provide, the subjects of those postings are less pleased by the shield of the username. Because of the CDA, the subject of anonymously posted material cannot hold the website, or the ISP, liable for the content.[75] Instead, the

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[68] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-57, 560 (1985) (discussing the First Amendment and copyright issues to examine whether the fair use doctrine applied to alleged act of copyright infringement).

[69] Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004).

[70] *Id.* at 563 (citing *In re* Capital Cities/ABC, Inc., 918 F.2d 140, 143 (11th Cir. 1990)).

[71] *See* John Wiley & Sons, Inc. v. Doe Nos. 1-30, 284 F.R.D. 185, 189 (S.D.N.Y. 2012); *see also* Arista Records LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010).

[72] Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006).

[73] 17 U.S.C. § 512(h) (2006); *see also* Signature Mgmt. Team, LLC v. Automattic, Inc., No. C-13-80028 RCB, 2013 WL 1739480, at *3 (N.D. Cal. Apr. 22, 2013) ("[T]he purpose of a DMCA subpoena is to identify a copyright infringer.").

[74] *In re* Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 260–68 (D.D.C. 2003), *rev'd on other grounds*, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

[75] 47 U.S.C. § 230 (2006).

target of any lawsuit has to be the actual author.[76] Liability cannot attach to a "Jane Doe" defendant, however, so the identity of the author must be determined before the court can render a judgment.[77] As a result, the use of subpoenas to unmask anonymous speakers that use the Internet to publish their content is on the rise.[78]

Courts are typically willing to unmask an anonymous author, but their standards to do so vary. This is because a court order, requested by a private party in a civil lawsuit, constitutes state action that is subject to the constitutional limitations set forth in the First Amendment.[79] Regardless of which standard a court applies, where discovery possibly impinges on First Amendment rights, courts will "balance the burdens imposed . . . against the significance of the . . . interest in disclosure,"[80] to "determine whether the 'interest in disclosure . . . outweighs the harm.'"[81] Many jurisdictions have created their own version of the procedural standards that direct a website or ISP to provide personally identifying information about the anonymous author.[82] While these standards vary, for the most part, the initial burden in each of these cases rests on the party seeking discovery and requires some degree of proof of the underlying claim.[83] The Supreme Court has yet to weigh in on this subject; although, given the inconsistency by which courts apply these standards and the reach of the Internet stretching across all states equally, the issue is ripe for judicial intervention to create a uniform standard.[84]

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[76] Megan M. Sunkel, Comment, *And the I(sp)s Have it . . . But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation,* 81 N.C. L. REV. 1189, 1196-97 (2003).

[77] Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 573 (N.D. Cal. 1999).

[78] Ashley I. Kissinger & Katharine Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Online Speech*, J. INTERNET L., Mar. 2010, at 1; Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 320 (2008).

[79] Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1091-92 (W.D. Wash. 2001) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)).

[80] Perry v. Schwarzenegger, 591 F.3d 1126, 1140 (9th Cir. 2010) (internal quotation marks omitted) (quoting AFL-CIO v. FEC, 333 F.3d 168, 176 (D.C. Cir. 2003)).

[81] Perry v. Schwarzenegger, 591 F.3d 1126, 1140 (9th Cir. 2010) (quoting in part Buckley v. Valeo, 424 U.S. 1, 72 (1976)).

[82] *In re* Anonymous Online Speakers, 661 F.3d 1168, 1173-76 (9th Cir. 2011).

[83] *Id.* at 1176.

[84] Even in late 2013, a number of states still lack any reported decision on the process for identifying an anonymous Internet user. Those states include: Alabama; Alaska; Arkansas; Colorado; Georgia; Hawaii; Iowa; Kansas; Kentucky; Louisiana; Maine; Minnesota; Mississippi; Missouri; Montana; Nebraska; New Mexico; North Dakota; Ohio; Orgeon; Rhode Island; South Carolina; South Dakota; Utah; Vermont; and Wyoming.

1. The Motion to Dismiss and Good Faith Standards

The most easily satisfied standard merely requires that the Court be convinced the party seeking the information "has a legitimate, good faith basis to contend that it may be the victim of [actionable] conduct."[85] This so-called "good faith" test offers the least protection of an author's anonymity: "Plaintiffs can often initially plead sufficient facts to meet the good faith test . . . even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision."[86] In courts that apply this standard, or the motion to dismiss standard, there is a strong possibility that courts will needlessly strip the author's anonymity if they lack substantial evidence of any wrongdoing, giving little to no effect to the First Amendment protections the anonymous author would otherwise be afforded. The following courts have adopted this *prima facie* standard:

- Florida[87]
- Illinois[88]
- Michigan[89]
- North Carolina[90]
- Virginia[91]
- Wisconsin[92]

Utilizing the "motion to dismiss" standard, when challenging the author's anonymity, the identity of the author is uncovered on nearly every occasion.

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[85] *In re* Subpoena Duces Tecum to Am. Online, Inc., No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

[86] Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005).

[87] Rich v. City of Jacksonville, No. 3:09-CV-454-J-34MCR, 2010 WL 4403095, at *11 (M.D. Fla. Mar. 31, 2010) (In the criminal context, the party "must demonstrate an overriding and compelling interest in obtaining the material at issue in the subpoena.").

[88] Maxon v. Ottawa Publ'g Co., 929 N.E.2d 674-66 (Ill. App. Ct. 2010).

[89] Thomas M. Cooley Law Sch. v. Doe 1, 833 N.W.2d 331, 344 (Mich. Ct. App. 2013) ("To the extent that Doe 1 urges us to adopt *Dendrite* because it more adequately protects other interests or is better public policy, we decline to do so.").

[90] Alvis Coatings, Inc. v. John Does 1-10, No. 3L94 CV 374-H, 2004 WL 2904405, at *3 (W.D.N.C. Dec. 2, 2004) ("[W]here a plaintiff makes a prima facie showing that an anonymous individual's conduct on the Internet is otherwise unlawful, the plaintiff is entitled to compel production of his identity in order to name him as a defendant and to obtain service of process.").

[91] *In re* Subpoena Duces Tecum to Am. Online, Inc., No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

[92] Lassa v. Rongstad, 718 N.W.2d 673, 697 (Wis. 2006).

2. The Summary Judgment Evidence Standard

At the opposite end of the spectrum from the motion to dismiss/good faith standard, is the standard articulated by the New Jersey Superior Court in *Dendrite*.[93] The *Dendrite* standard requires that a party seeking the identity of an anonymous author "produce sufficient evidence supporting each element of its cause of action, on a prima facie basis."[94] The court then balances "the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure . . . to allow the plaintiff to properly proceed."[95]

Shortly after the *Dendrite* holding, the Supreme Court of Delaware adopted a modified version of the evidence standard in *Cahill*.[96] There, the court explained, "before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process, he must support his defamation claim with facts sufficient to defeat a summary judgment motion."[97] In creating this standard, the Delaware court qualified its evidence requirement by noting that "the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff's control*."[98] The Delaware court also expanded the requirements set forth in *Dendrite* by placing an additional burden on the party seeking the information.

> [T]o the extent reasonably practicable under the circumstances, the [party seeking information under *Cahill*] must undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure. . . . [and] withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request.[99]

The following courts have adopted a form of this standard:

- Arizona[100]
- California[101]

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93 Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

94 *Id.*

95 *Id.*

96 Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005).

97 *Id.* at 460.

98 *Id.* at 463.

99 *Id.* at 460-61.

100 Mobilisa Inc. v. Doe, 170 P.3d 712, 717 (Ariz. Ct. App. 2007).

101 Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 245 (Cal. Ct. App. 2008).

- Connecticut[102]
- Delaware[103]
- District of Columbia[104]
- Idaho[105]
- Indiana[106]
- Maryland[107]
- Massachusetts[108]
- Nevada[109]
- New Hampshire[110]
- New Jersey[111]
- New York[112]
- Pennsylvania[113]
- Texas[114]
- Washington[115]
- United States Court of Appeals for the Ninth Circuit[116]

The majority of courts that have adopted a standard for disclosure of the identity of an anonymous author appear to utilize this standard, which offers

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102 Doe I v. Individuals, 561 F. Supp. 2d 249, 256 (D. Conn. 2008).

103 *Cahill*, 884 A.2d at 457.

104 Solers, Inc. v. Doe, 977 A.2d 941, 954-57 (D.C. 2009).

105 Cornelius v. Deluca, No. 1:10-CV-027-BLW, 2011 WL 977054, at *1 (D. Idaho Mar. 15, 2011).

106 *In re* Ind. Newspapers Inc., 963 N.E.2d 534, 551-52 (Ind. Ct. App. 2012) (applying "*Dendrite* test" from Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001)).

107 Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 435 (Md. 2009).

108 London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 162 (D. Mass. 2008) (subjecting the plaintiffs' subpoenas "to somewhat heightened scrutiny" in a copyright infringement context); *see also* McMann v. Doe, 460 F. Supp. 2d 259, 268 (D. Mass. 2006) (explaining that while "there may [ ] be problems with the mechanics of a summary judgment test, it is reasonable to apply some sort of a screen to the plaintiff's claim before authorizing the subpoena.").

109 Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205, 1216 (D. Nev. 2008) ("[S]o long as an objection is raised by a party with standing to raise it, *Cahill* articulates the correct standard.").

110 Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184, 193 (N.H. 2010) (applying "*Dendrite* test.").

111 *Dendrite*, 775 A.2d at 760-61.

112 Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 700 (N.Y. Sup. Ct. 2007).

113 Pilchesky v. Gatelli, 12 A.3d 430, 442 (Pa. Super. Ct. 2011) (using a modified version of the *Dendrite*/*Cahill* test).

114 *In re* Does 1–10, 242 S.W.3d 805, 814-15 (Tex. App. 2007).

115 SaleHoo Grp., Ltd. v. ABC Co., 722 F. Supp. 2d 1210, 1215 (W.D. Wash. 2010) (adopting a "*Dendrite*-style test [a]s appropriate to safeguard the First Amendment interests at stake in this action.").

116 *In re* Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011).

greater protection for the anonymity of the author and greater acknowledgment of the author's First Amendment right to free speech.

V. Conclusion

The Internet is a truly global universe. Social media users may publish anonymous content from just about anywhere through mobile devices and applications that perform on virtually all platforms worldwide.[117] Because of this virtual blurring of lines between published content and ownership of that content, the likelihood of abuse of the cloak of anonymity continues to increase.

Without any true methodology for social media user identification, there will continue to be an unsteady balance between the right to speak anonymously and the right to publish and utilize social media through pseudonyms. Courts today continue to struggle when confronted with requests to direct social media sites to provide personally identifiable information regarding anonymous users of that website. Absent implementation of a uniform process and standards by which anonymous authors can be unmasked, courts across the country will provide inconsistent results as to whether or not they will compel identification. This erratic application of law to social media users can has and has resulted in mass confusion, not only among Internet users, but also among the underlying business owners who must respond to the subpoenas seeking anonymous author information.

Until the Supreme Court decides a case regarding anonymous authorship, the interplay between the First Amendment and the right to speak anonymously will remain unsettled. Whether or not a social media users will have their anonymity stripped away is contingent upon a number of factors, including the type of speech and the location in which the speech occurred. In the interim, social media users are recognizing and interpreting the extent of their free speech rights without guidance from the Supreme Court. Business owners who traffic in social media platforms, on the other hand, are responsible for the rights of the social media entity, as well as what constitutes tortious speech. While these two policies continue to clash in the courts, educating oneself on the underlying legal and policy issues is the best way to resolve any issue pertaining to use of a pseudonym in social media as efficiently, and amicably, as possible.

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[117] The question of where the proper jurisdiction for filing a lawsuit relating to online content can itself be the subject of another article, and is purposefully not discussed here.

New Media, New Policies: Media Restrictions Needed to Reduce the Risk of Terrorism

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I. Introduction

The world today is faster than it was yesterday. Speed and growth through improvements in technology—including the development of social media—have dissolved historical boundaries in time and space and have brought new dynamics to media coverage of major events. Despite this changing environment, this Article will show that media law remains categorized into two historical paradigms: domestic law enforcement activities and overseas military activities. However, this distinction between home and abroad is no longer relevant because neither the media nor the nation's problems fit neatly into those two categories. The Boston marathon bombing in April 2013 was the latest blend of domestic and foreign concerns, and it highlighted the sensationalistic combination of traditional media and social media.[1] The unexpected attack and subsequent manhunt converted Boston into a quasi-battlefield, complete with armored personnel and a shutdown city.[2] To reduce the risk of this type of tragedy happening again and to protect the public, new, limited restraints on the media are necessary during extreme, high-profile, publicity-seeking events.

This Article discusses the status of media law with a broad focus on criminal and military operations. This Article also argues that the government must take steps to prevent future terrorism tragedies by imposing limited restraints on the media. Specifically, for high-profile events that imperil public safety, the government must implement geographic restraints on the media via press pools, impose limits so that only trained journalists are involved, and restrict graphic-image dissemination. These restraints will marginalize the attention terrorists acquire through media coverage of attacks. Otherwise, attention-seeking criminals will remain incentivized to make high-profile attacks due to the potential for saturated media coverage.

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[1] Jason Burke, *Is Terrorism Now International or Domestic?*, Guardian (Apr. 22, 2013), http://www.theguardian.com/world/2013/apr/22/is-terrorism-international-or-domestic.

[2] *Boston on Edge: One Bombing Suspect Dead, Another Captured*, Verge (Apr. 19, 2013, 4:37 AM), http://www.theverge.com/2013/4/19/4241798/boston-marathon-bombers-firefight-manhunt.

II. Technology, Globalization, and the Creation of Risk

Eight years ago, in *The World is Flat*, Thomas Friedman famously chronicled the "leveling of the playing field" in global commerce, as globalization dissolved borders while commerce prospered.[3] Those borders have continued to fall through the present day as developments in technology create plentiful and rapid global connections.[4] Technology influences the media as well and allows the media a faster, greater impact than ever before, and social media has further expanded that reach.[5]

A. New Terrorism Risks

Technology and globalization arguably have increased the threat of terrorism as boundaries have fallen.[6] The Boston marathon bombing in April 2013 displayed the latest dangers posed by the fusion of international terrorism, domestic terrorism, and technology. The bombing suspects lived in the United States for over ten years, but were born in Chechnya (an area known for Islamic extremism), visited the region, and Russian authorities suspected them of having terrorist ties.[7] These suspects symbolized the threat represented by the dangerous nexus of international and domestic risks.[8]

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[3] Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century 7 (2d ed. 2006).

[4] *Id.* at 6-7.

[5] *Social Media Reshapes Journalism*, statesman.com (Apr. 24, 2010, 6:47 PM), http://www.statesman.com/news/news/opinion/social-media-reshapes-journalism/nRsJ5/.

[6] Richard Bloom, *Fear of Flying: Globalization, Security, and Terrorism*, TR News, July-Aug. 2010, at 21, 21-23, *available at* http://onlinepubs.trb.org/onlinepubs/trnews/trnews269.pdf.

[7] Greg Jaffe, Jenna Johnson & Joel Achenbach, *Federal Prosecutors Preparing Charges Against Boston Marathon Bombing Suspect*, Wash. Post (Apr. 22, 2013), http://articles.washingtonpost.com/2013-04-21/world/38717656_1_boston-marathon-dagestan-other-attacks; Mark Arsenault, Jenn Abelson, Patricia Wen & David Filipov, *Relatives of Marathon Bombing Suspects Worried That Older Brother Was Corrupting 'Sweet' Younger Sibling*, boston.com (Apr. 19, 2013, 12:54 PM), http://www.boston.com/metrodesk/2013/04/19/bombing-suspects-were-local-normal-immigrants/AGztkXv4Y9b6sfAsVzcDQO/story.html.

[8] The Boston marathon bombings were a terrorist event because they were ideologically motivated bombings designed to terrorize. Louis Jacobson, *Terrorism?*, Tampa Bay Times, July 14, 2013, at 1P, *available at* 2013 WLNR 17214935. The definition of "terrorism" includes anything "designed to have far-reaching psychological effects beyond the immediate victim or objects of the terrorist attack. It is meant to instill fear within, and thereby intimidate, a wider 'target audience.'" *Id.*

B. Media Coverage of Terrorism

1. "Death is News"

Stories about terrorism, particularly in highly populated areas such as Boston, draw immense media and societal attention. Studies demonstrate that violent "high profile events" attract the most attention on the news,[9] and media outlets generally operate as for-profit institutions which need increased viewership.[10] Some claim that the media has learned to capitalize on "bestseller crime"[11] by following a "death is news" mentality.[12] Such news stories incentivize the media's coverage of tragic events, which then logically feeds public social media activity.[13]

2. Coverage Supports the Terrorists' Desires

Unfortunately, the media's ability to shower attention on tragedy unwittingly serves the desires of the terrorists.[14] Many observers agree that terrorists choose public targets because of the attention they draw: "[b]y attacking highly visible targets in a dramatic manner, publicity-seeking criminals guarantee themselves saturated news coverage."[15] This coverage causes the media to become "an integral part of any terrorist act, providing star actors, script writers, and directors."[16] Therefore, in-depth media coverage incentivizes terrorists and the media aids terrorists in achieving their goals.[17] One can argue that by broadcasting devastation, the media's coverage fuels and motivates future attacks. Modern technology has only augmented the danger by making the broadcast easier and quicker via social media posts and traditional media channels.

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[9] Steven M. Chermak & Jeffrey Gruenewald, *The Media's Coverage of Domestic Terrorism*, 23 JUST. Q. 428, 435-36 (2006).

[10] Michelle Ward Ghetti, *The Terrorist Is A Star!: Regulating Media Coverage of Publicity-Seeking Crimes*, 60 FED. COMM. L.J. 481, 492 (2008).

[11] Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 18 (1961).

[12] Richard M. Bridges, *Some Thoughts on the National Media Coverage of the War on Terrorism*, ARMY MAG., Aug. 2007, *available at* 2007 WLNR 15709782.

[13] Americans express "concerns about new terrorist attacks at home" by a 2-to-1 ratio. Jacobson, *supra* note 8.

[14] Ghetti, *supra* note 10, at 488-89 (2008).

[15] *Id.* at 488.

[16] Yonah Alexander, *Terrorism, the Media and the Police*, 1 POLIC STUD.: INT'L. REV. POLICE DEV. 45, 51 (1978).

[17] *See* Bloom, *supra* note 6, at 22-23; Bridges, s*upra* note 12, ("Curiously, the national media report terrorist activity in terms of the number of victims killed by the terrorist. The identity of the terrorist is usually ignored, and the subliminal message is that the terrorist's suicide has somehow accomplished something.").

C. New Dangers Posed by Terrorism and Media Coverage

The April 2013 Boston tragedy was a first in many respects. High-profile manhunts are not unprecedented, but modern tools and the quick pace of media coverage added to the sensationalistic nature of the saga.[18] The event was the first in the "age of smartphones, [where] Twitter and Facebook[ ] provided an opportunity for everyone to get involved."[19] Within minutes, "thousands of people [took] to the Internet to play Sherlock Holmes."[20] Consequently, social media allowed millions of people around the world to see photos of the suspects instantly, thus helping to identify the suspects so law enforcement could find them.[21] However, the rapid-fire pace of information also caused problems. Instead of major media outlets controlling the coverage, social media expanded and augmented the traditional media coverage and the event became a chaotic, confusing, and widely followed affair.[22]

1. "One of the Most Alarming Events of Our Time"

A University of Virginia professor remarked that the bombing aftermath was "one of the most alarming social media events of our time" and the use of social media "spiraled out of control."[23] Many reports shared on social media were wrong, cast suspicion on innocent people, and provided bad tips to law enforcement.[24] Further, "[t]ens of thousands of social-media posts" spread arrest reports that proved to be untrue.[25] In a national tragedy, this misinformation increases public anxiety and is counterproductive.[26]

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[18] Ken Bensinger & Andrea Chang, *Boston Bombings: Social Media Spirals Out of Control*, L.A. TIMES (Apr. 20, 2013), http://articles.latimes.com/2013/apr/20/business/la-fi-boston-bombings-media-20130420.

[19] *Id.*

[20] *Id.*

[21] Carolyn Presutti, *Multi, Social Media Play Huge Role in Solving Boston Bombing*, VOICE OF AMERICA (Apr. 26, 2013), http://www.voanews.com/content/multi-social-media-play-huge-role-in-solving-boston-bombing/1649774.html.

[22] Bensinger & Chang, *supra* note 18.

[23] *Id.*

[24] *Id.*

[25] Michael Chertoff & Dallas Lawrence, *Investigating Terror in the Age of Twitter*, WALL ST. J. (Apr. 22, 2013, 7:26 PM), http://online.wsj.com/article/SB10001424127887324874204578437360241416842.html.

[26] In addition, addressing all of the bad information distracted officials from the primary mission. To confront the misinformation after the Boston bombing, the Boston police Twitter account eventually became the "go-to source for authoritative information." *Id.* But this was a catch-up effort and kept the police behind the curve—arguably detracting from the police's main mission of catching the criminals. *See id.*

2. Direct Danger

The detailed media coverage of the Boston marathon bombing posed a direct danger to law enforcement personnel.[27] On social media, people disclosed law enforcement's movements and tactics, ignoring requests not to do so.[28] Posting and broadcasting positions of law enforcement operations threatens officers' safety and jeopardizes the mission because the suspects could change escape routes or ambush law enforcement officers based on real-time public reports of their location.[29]

The Boston event could serve as a learning experience from which criminals analyze social media information to learn how to perfect a future attack. Future attackers may have watched the events in Boston and theorized ways to escape capture. There is a grave danger since this extensive media coverage served terrorists' intentions by feeding their desire for attention.

III. Status of Media Law

A. Media's Role

The media fills an important role in society. This role is enshrined in the U.S. Constitution; the press is the only institution named in the document,[30] which demonstrates its importance. The freedom of the press maintains open discussions that allow society members "to cope with the exigencies of their period."[31]

The founding fathers realized the value of the media's freedom.[32] Thomas Jefferson remarked, "[O]ur liberty depends on the freedom of the press."[33] James Madison noted that the media deserves credit "for all the triumphs which have been gained by reason and humanity over error and oppression."[34] Due to that historic role, the Supreme Court noted "the chief purpose" of the freedom of the press is "to prevent previous restraints upon publication."[35] The ability

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[27] Joe Gandelman, *Boston Marathon Bombing: Was Twitter for the Birds Or Revolutionary?*, Daily Courier (Apr. 26, 2013, 4:12 AM), http://www.thedigitalcourier.com/x383676483/Boston-Marathon-bombing-Was-Twitter-for-the-birds-or-revolutionary.

[28] *Id.*

[29] The media can hamper the work of law enforcement in other contexts as well, but information spreads so quickly with social media that it increases risk to law enforcement officials. *See* Alexander, *supra* note 16.

[30] U.S. Const. amend. I.

[31] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 147 (1967) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)) (internal quotation mark omitted).

[32] State *ex rel.* Singleton v. Woodruff, 13 So. 2d 704, 706 (Fla. 1943).

[33] *Id.*

[34] Near v. Minn. *ex rel.* Olson, 283 U.S. 697, 718 (1931).

[35] *Id.* at 713.

to publish freely allows the media to fulfill Thomas Jefferson's prescription of protecting liberty and that important role continues today, with more modern tools.

B. Media's Freedom

Typically, the media enjoys broad protection, and when people prevent the media from publishing a story, it is "the most serious and the least tolerable infringement on First Amendment rights."[36] *Branzburg v. Hayes* alluded to the media's freedom to cover news because it would not place a "restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire."[37] Therefore, there is strong support for the media's ability to access and publish information.

To illustrate the public benefit derived from publication, in the famous Pentagon Papers case, the Supreme Court allowed the *New York Times* to publish information about the government's involvement in the Vietnam War.[38] The government sought to prevent the story's publication, but the Court noted the government "carries a heavy burden of showing justification for the imposition of such a restraint."[39] The government did not meet its burden in that case because there was "a debate of large proportions" in the nation about the Vietnam War and the publication of the information was "highly relevant to the debate."[40] The Court's holding illustrates the importance of press-facilitated, public discussions.[41] Due to its First Amendment protection, the press generally may freely cover the news and publish stories.[42]

Regarding crime, the press typically has the ability to cover criminal trials, which must be open to the public.[43] In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court upheld the presumption of criminal trial openness because of the important role trials play in the criminal justice system.[44] Criminal trials provide "an outlet for community concern, hostility, and emotion" after a crime.[45] The ability of the press to cover what happens in a criminal trial sup-

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[36] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[37] Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (The Court held that the First Amendment does not protect a newsman from testifying to a grand jury, but the Court commented on the freedom of the press and supported it.).

[38] *See generally* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

[39] *Id.* (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

[40] *Id.* at 724.

[41] *Id.*

[42] *Id.*

[43] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556 (1980).

[44] *Id.*

[45] *Id.*

ports the "therapeutic value of public trials" to a community[46] and this freedom allows a community to see that a criminal does not escape justice.[47]

C. Restricting the Press

Despite the importance of the press's freedom, there are valid reasons to restrict it. In *Near v. State of Minnesota*, the Supreme Court noted that freedom of the press "is not an absolute right, and the state may punish its abuse."[48] Thus, as the Florida Supreme Court elaborated, the press can exercise its freedom only "so long as public morals, public health, public safety and convenience are observed."[49] The Supreme Court applied a three-part test in *Globe Newspaper Co. v. Superior Court for Norfolk County* to determine whether the press should have access to a criminal trial:

> (1) Whether the activity was open historically;
> (2) Whether access by the media plays a role in the functioning of the judicial process or the government;
> (3) Whether there is a compelling governmental interest and the restriction is narrowly tailored.[50]

The first two prongs are useful to determine the value media access adds to a given activity.[51] The final prong requires a restriction to pass strict scrutiny.[52] Even if the government satisfies the first two prongs, it can still restrict access to information if it can satisfy the third prong.[53]

In *Smith v. Daily Mail Publishing Company*, the Court described a compelling interest as "the highest form of state interest."[54] In determining what constitutes a compelling state interest, courts analyze the needs of the government and the needs of the media, public, or individual.[55] The Florida Supreme court in *The Miami Herald Publishing Co. v. Lewis*, noted closing criminal cases to the public if openness would deny the defendant an impartial jury, the right to a

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[46] *Id.*

[47] This media protection presumably will apply to any future trial of the Boston marathon bombing suspect, who was indicted in June 2013 on thirty counts. Peter Finn, *Boston Marathon Bombing Suspect Dzhokhar Tsarnaev Indicted on 30 Counts*, WASH. POST (June 27, 2013), http://www.washingtonpost.com/world/national-security/boston-bombing-suspect-indicted-on-30-counts/2013/06/27/c3be3446-df53-11e2-963a-72d740e88c12_story.html.

[48] Near v. Minn. *ex rel.* Olson, 283 U.S. 697, 708 (1931).

[49] State *ex rel.* Singleton v. Woodruff, 13 So. 2d 704, 705 (Fla. 1943).

[50] Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 605-07 (1982).

[51] *Id.*

[52] *Id.* at 606-07.

[53] *Id.*

[54] Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979).

[55] *See generally id.*

fair trial, and a trial "free of widespread hostile publicity."[56] This restriction on the media passed strict scrutiny because the government has a compelling interest in protecting the fairness of the justice system.[57]

Additionally, even if a governmental interest is compelling, a media restriction needs to be narrowly tailored to be constitutional.[58] Justice O'Connor's concurrence in *Globe Newspaper Co.* noted that completely excluding the media from certain trials was not narrowly tailored.[59] Blanket restrictions are rarely the most narrow, precise way to support a governmental interest. Instead, a case-by-case approach is better. The Supreme Court has stated that televised media coverage of trials could deny a defendant the right to a fair trial in some situations.[60] Therefore, excluding cameras—but not the media entirely—is a permissible, narrowly tailored restriction.[61]

When weighing compelling interests and narrowly tailored restrictions, there is often a tension between the government and the media. This tension exists in police operations and national security events, where the government often presents the need to protect the public as a compelling governmental interest to justify media restrictions. Some specific situations where police issues and national security justify restrictions on the media follow.

1. Police Secrets

Due to the need to catch criminals and protect the public safety, the state can prevent public disclosure of details about active, ongoing investigations.[62] A Connecticut court remarked as follows:

> [I]t is competent for legislation to curtail freedom of speech and its closely allied constitutional guarantee, freedom of the press, where a proper exercise of the police power demands such curtailment.[63]

Originally, "police secrets rule," a common law rule, protects aspects of ongoing investigations from public access.[64] Keeping these details secret supports

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[56] Miami Herald Publ'g Co v. Lewis, 426 So. 2d 1, 7 (Fla. 1982).

[57] *See generally id.*

[58] *Globe Newspaper Co.*, 457 U.S. at 607.

[59] *Id.* at 611.

[60] Estes v. Texas, 381 U.S. 532, 549 (1965).

[61] *See generally id.*

[62] *See generally* Michalowski v. City of New Britain, 16 Conn. Supp. 9 (Conn. Super. Ct. 1948).

[63] *Id.* at 11.

[64] Barfield v. City of Fort Lauderdale Police Dep't, 639 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 1994).

the police's ability to "apprehend violators of the law."[65] Catching criminals is a core governmental function and criminals could benefit from media disclosure. Therefore, to preserve the public safety, the media has no right to access or publish topics related to active criminal investigations.

The Federal Freedom of Information Act codified elements of the police secrets doctrine, exempting from disclosure information that "could reasonably be expected to interfere with enforcement proceedings."[66] Many states have statutes reflecting the doctrine as well. In Florida, statutes expressly protect "active criminal investigative information" from disclosure.[67] The statutes define an investigation as "active" when there is "a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future."[68] This definition allows the government to investigate and prosecute crimes. Nevertheless, the "foreseeable future" time constraint keeps the government accountable and does not allow it to indefinitely withhold information, thus keeping the restriction narrowly tailored.

The government bears the burden of proving that an investigation is still active.[69] By placing the burden on the government, it ensures the government narrowly tailors the doctrine and thus, is justified in withholding information. This arrangement supports the media's freedom, because the information could be disclosed if the government fails to justify the restriction.

2. National Security

Additionally, the government can restrain the press from publishing information that would "threaten national security."[70] National security qualifies as one of the exceptions to the freedom of the press since it is one of "the most urgent situations" facing the safety of the nation.[71] Therefore, Congress has taken an active role in placing restrictions in statutes, to prevent disclosures benefiting enemies or criminals. Two examples are:

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[65] *Id.*

[66] 5 U.S.C. § 552(b)(7)(A) (2012).

[67] City of Miami v. Metro. Dade Cnty., 745 F. Supp. 683, 686 (S.D. Fla. 1990) (citing FLA. STAT. § 119.07(3)(d)).

[68] FLA. STAT. § 119.011(3)(d)(2) (2013), *available at* http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0100-0199/0119/Sections/0119.011.html.

[69] *Barfield*, 639 So. 2d at 1015.

[70] United States v. Wash. Post Co., 446 F.2d 1322, 1325 (D.C. Cir. 1971).

[71] Carlos A. Kelly, *The Pen Is Mightier Than the Sword or Why the Media Should Exercise Self-restraint in Time of War*, FLA. B.J., Jan. 2003, at 22, 24.

> Espionage Act: The act criminalizes the disclosure of "information relating to the national defense,"[72] including "the unauthorized possession and disclosure of documents."[73]
>
> Freedom of Information Act: The Act exempts records that must be "kept secret in the interest of national defense or foreign policy."[74]

These types of restrictions allow the government to fulfill its public safety and security functions.

In the years following the terrorist attacks of September 11, 2001, with national focus on security, national security and terrorism became key issues for the court system to confront.[75] In *United States v. Abu-Jihaad*, the Second Circuit held that the Espionage Act forbade a Navy insider from disclosing information to terrorist groups.[76] However, despite a renewed focus on national security, the government still must justify national security restrictions.[77] It cannot simply claim a blanket exception for national security.

One federal district court noted that the government could not comprehensively protect all documents pertaining to the September 11, 2001 terrorist attacks.[78] The court noted, "national security concerns cannot justify unlimited delay" in producing documents.[79] Similar to the Pentagon Papers case discussed earlier, significant public benefit derived from the documents' information, which supported disclosure and therefore, protection due to national security is not automatic.[80]

3. Military Operations

An additional area where the government restricts the media is military operations. In ancient China, leaders such as the warrior Sun Tzu advised that the "formation and procedure used by the military should not be divulged

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[72] 18 U.S.C. § 793(d) (2006).

[73] *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228, 2230-31 (2009).

[74] 5 U.S.C. § 552(b)(1)(A) (2012).

[75] After the terrorist attacks of September 11, 2001, the government's focus shifted to counterterrorism and national security. Although still operating within the umbrella of the Freedom of Information Act, the Bush administration emphasized the need to protect "information critical to homeland security, such as national security, law enforcement and critical infrastructure information." Edward B. Gerard, *Bush Administration Secrecy: An Empirical Study of Freedom of Information Act Disclosure*, 15 MEDIA L. & POL'Y 84, 93 (Fall 2005).

[76] *See generally* United States v. Abu-Jihaad, 630 F.3d 102 (2d Cir. 2010).

[77] ACLU v. Dep't of Def., 389 F. Supp. 2d 547, 551-52 (S.D.N.Y. 2005).

[78] ACLU v. Dep't of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004)

[79] *Id.* at 504.

[80] *See generally ACLU*, 389 F. Supp. 2d at 547.

beforehand."[81] This viewpoint is still relevant today. In *United States v. Voorhees*, a military court noted that information restrictions are necessary "to protect and preserve the lifeline of the republic in the theatre of military operations."[82] By necessity, restrictions are justified and the press has less freedom to cover military operations.[83]

a. Historical Access

Despite the need to protect military information, the media has historically enjoyed wide access to military operations.[84] The press's access to the military dates to the beginning of the War for Independence, where journalists "accompan[ied] American troops on military operations, even when those actions depended upon the element of surprise."[85] This access generally continued up through other major military operations.

In World War II, the government allowed extensive access and "[c]orrespondents flew on bombing missions, rode destroyers, went on patrols, were strafed and shelled and frequently became the targets for snipers."[86] Access continued through Vietnam, where the press had greater freedom to cover military activities and access military operations.[87] Reporters "were given free rein . . . [and] censorship was virtually nonexistent."[88] More recently, the government allowed the embedding of journalists in military units in Iraq.[89] By allowing access, the military balanced the public's thirst for information with the military's need to protect plans and other sensitive information.[90] The access granted to the media shows the military recognizes the media's role in society and attempts to accommodate it.

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[81] Kelly, *supra* note 71 (quoting Steven S. Neff, *The United States Military vs. The Media: Constitutional Friction*, 46 MERCER L. REV. 977, 987 (1995)) (internal quotation marks omitted).

[82] United States v. Voorhees, 16 C.M.R. 83, 105 (1954).

[83] *See id.* at 105-06.

[84] Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars"*, 73 GEO. L.J. 931, 932 (1985).

[85] *Id.*

[86] *Id.* at 939 (quoting M. STEIN, UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS 95 (1968)) (internal quotation marks omitted).

[87] *See generally* Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1563 (S.D.N.Y. 1991).

[88] Cassell, *supra* note 84, at 942.

[89] Nia Y. McDonald, *Under Fire: The Fight for the War Correspondent's Privilege*, 47 HOW. L.J. 133, 144 (2003).

[90] Cassell, *supra* note 84, at 968-69.

b. Limits on Media

Any right to access military operations is not absolute and the government frequently and strategically controls the media's access. In *JB Pictures, Inc. v. Department of Defense*, the D.C. Circuit Court noted that military bases do not share "the tradition of openness" of other government institutions; thus, the military can restrict media access.[91] However, in *Nation Magazine v. Department of Defense*, a Federal District Court noted that there might be "some minimal right of access" to view combat operations, but this is not an absolute right.[92] The D.C. Circuit Court noted that the media has no constitutional "right to be embedded with military units."[93] Allowing media access to troops is often a policy choice by the military, which has wide discretion to set policies and attach conditions to the media's access.[94]

On its own initiative, the military can exclude journalists or impose access restrictions and censorship.[95] So even if granted limited ability to access military operations, the media does not necessarily have the ability to report freely on those operations. Thus, the military closely regulates the press's ability to cover military operations.[96]

c. Risks of Media Involvement—"This Stinks!"

Even if unintentional, the media can function as the "intelligence arm" of hostile groups.[97] During the lead-up to the Persian Gulf War in 1991, General Norman Schwarzkopf noted that "our own newspaper and TV reports had become Iraq's best source of military intelligence," and on one occasion remarked, "This stinks! *Newsweek* just printed our entire battle plan."[98]

More recently—before the terrorist attacks of September 11, 2001—media coverage of National Security Agency counterterrorism efforts prompted the terrorist group *al-Qaeda* to stop communicating via a certain radio channel that

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[91] JB Pictures, Inc. v. Dep't of Def., 86 F.3d 236, 240 (D.C. Cir. 1996).

[92] *Nation Magazine*, 762 F. Supp. at 1572.

[93] Flynt v. Rumsfeld, 355 F.3d 697, 704 (D.C. Cir. 2004).

[94] *Id.* at 705-06.

[95] Cassell, *supra* note 84, at 932 (declaring "the exclusion of journalists" appropriate).

[96] These restrictions and censorship on the media occasionally distorted the news. *See* Cassell, *supra* note 84, at 938. For example, after the Japanese bombed Pearl Harbor, the military did not admit to the level of devastation of the attack. *Id.* The military "conceded only the loss of two battleships . . . when in fact five were sunk and three were damaged; publications had to conform to the official view." *Id.* The media could not properly and accurately discuss the news because it had to conform to the government policy. *Id.* This inaccuracy is a risk of government censorship because the public does not get accurate information.

[97] Ghetti, *supra* note 10, at 498.

[98] Kelly, *supra* note 71, at 28 (quoting H. NORMAN SCHWARZKOPF, IT DOESN'T TAKE A HERO 343 (1992)) (internal quotation marks omitted).

the government was monitoring.[99] Thus, terrorists change practices in response to media coverage of counterterrorism efforts.[100] From traditional military operations, to more sophisticated counterterrorism operations, there is a risk that media disclosure could benefit hostile groups.

d. Policy Today

Today, the Assistant Secretary of Defense for Public Affairs manages the Department of Defense's information and follows the Department's "Principles of Information."[101] The policy commands the Department to "make available timely and accurate information so that the public, the Congress, and the news media may assess and understand the facts about national security and defense strategy."[102] The policy prevents the government from withholding information to protect it from "criticism or embarrassment."[103]

Despite the openness language, the policy allows the government to withhold information that "would adversely affect national security."[104] Although vague, this reasoning is similar to that seen with other national security and police secret issues, showing the attempt to balance the media's access with the government's need to keep some information away from the public.

IV. New Media Policies

The above policies set a foundation, but there is a need for new policies to adapt to changes in the world. Florida Senator Marco Rubio acknowledged the new threats posed by modern terrorists:

> We have to deal with it. The world changed after 9/11, and it changed after Boston [the marathon bombing]. It's just a struggle to try to balance our . . . freedoms and liberties with our need to provide for national security.[105]

In providing for national security, the balance between security and freedom must remain. Nevertheless, enhancements are needed because no comprehen-

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[99] *Media Incentives and National Security Secrets*, *supra* note 73, at 2232.

[100] *See generally id.*

[101] *Principles of Information*, U.S. Dep't of Def., http://www.defense.gov/admin/prininfo.aspx (last visited Oct. 9, 2013) (In making information "fully and readily available," the policy states it keeps with the "letter and spirit" of the Freedom of Information Act.).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Alex Leary, *Marco Rubio Cites Boston Bombing in Defense of Phone Monitoring*, Tampa Bay Times (June 8, 2013), http://www.tampabay.com/news/politics/stateroundup/marco-rubio-cites-boston-bombing-in-defense-of-phone-monitoring/2125630.

sive policy exists to mitigate the dangers of media coverage during domestic terrorism incidents.

The existing national security and military exceptions to media disclosure are still relevant, but the definitions of police, national security, and military operations are evolving and blurring due to terrorism risks, improvements in technology, and the expanded reach of the media. Therefore, relying on these expanding definitions, new restrictions on media coverage will fit into the general national security exception to public access to ensure that attention-seeking terrorists do not use the modern media to their own advantage.

A. Specific Limits on the Press

The military has long implemented procedures to mitigate the operational risks caused by media exposure.[106] After the United States' invasion of Grenada in the 1980s, a panel of experts sponsored by the Department of Defense recommended the following ways to restrict the media while still allowing some involvement of the media in military operations:

- Involve media in planning discussions.
- Create media pools to limit the amount of reporters.
- Appoint qualified personnel to liaison with media.
- Build rapport through meetings and education.[107]

These proposals supported military needs, while accommodating media access.

Other authors have proposed restricting media coverage of terrorism, which could support domestic security; such proposals acknowledge the need to reduce the risk posed by attention-seeking terrorists.[108] Michelle Ghetti, a law professor, had hoped to "serve as a catalyst" to stimulate debate about the following possibilities of reasonably restraining media coverage in the United States:[109]

- Denote broadcast areas.
- Create "briefing areas," without cameras or recordings.
- Appoint spokespersons.
- Implement a pool-system for reporters to restrict the number of people and cameras.

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106 *See* William A. Wilcox, Jr., *Security Reviews of Media Reports on Military Operations: A Response to Professor Lee*, 26 HARV. J.L. & PUB. POL'Y 355, 367 (2003) (discussing the results of the post-Granada media meetings).

107 *See id.*

108 *See generally* Ghetti, *supra* note 10.

109 *Id.* at 487.

- Restrict "inflammatory or aggravating information" during a crisis.
- Prohibit the disclosure of tactical "how to" information about the attack.[110]

These new restraints would function to prevent terrorists from getting desired attention, but likely could be too broad to gain acceptance if applied to all situations.

An additional example is Afghanistan's recently adopted media restraints that confront the problems caused by media images perpetuating terrorism when faced with severe risk of terrorism within its borders.[111] The Afghan government and media mutually agreed to restraints.[112] The government realized the problem and that "concerns have grown over real-time media coverage of terrorist attacks."[113] To address these concerns, the Afghan media community agreed to the following restrictions: avoid broadcasting disturbing pictures of attacks; avoid publishing images of security forces engaged in counter-terrorism operations; and utilize the highest professional accuracy when covering terrorism stories.[114] These examples demonstrate that governments and leaders, on a global scale, realize the dangers of high-profile media coverage that supports the terrorists' goals. Elements of all the above could be tailored to fit modern needs and adapted to keep pace with technology. The government must play an active role to lead this effort to protect the public safety.

Several specific restrictions that would improve the nation's security and that should be adopted via federal legislation include the following: geographic restraints through press pools, journalist training requirements, and image restraints. These new policies should be a tool that the government can invoke in high-stakes situations. Just as the government has the burden of justifying the police secrets doctrine in a given situation, the government needs to have the burden of invoking domestic national security restraints on the media during and immediately after high-profile terrorist events.

1. Geographic Restraints Through Press Pools

First, the government should tightly manage the location and access of the press by using press pools, where limited numbers of journalists get direct

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110 *Id.* at 504-06.

111 *Afghan Media and Security Agencies Agree on Coverage Protocols*, INT'L FED'N JOURNALISTS (Mar. 11, 2010), http://mena.ifj.org/en/articles/afghan-media-and-security-agencies-agree-on-coverage-protocols.

112 *Id.*

113 *Id.* (quoting International Federation of Journalists General Secretary Aidan White).

114 *Id.*

access to operations. All media could access an event from the surrounding areas. However, within an affected area, the government should create media pools, and allocate journalists to these pools. Thus, journalists could be embedded with the police units just as they are with military units overseas. The reporter pools could attach to certain units, such as command centers, police groups, aviation groups, or other functional groups.

This arrangement would ensure that the information flow comes directly from the proper source and would mitigate the problems caused by misinformation and the hyper-pace of information, as occurred during the Boston bombing aftermath. Attaching media members to police units will allow the government to control the pace of information better, thus avoiding a media frenzy that would spiral out of control. Additionally, it will prevent many of the false reports seen in the Boston marathon bombing because the police would not have to constantly catch-up to the media's reporting.

Further, by managing and tracking the location of the press, the policy will better protect law enforcement officials. The policy will prevent the release of the locations and tactics of law enforcement officials. Therefore, criminals attempting to escape detection could no longer track the location of police in the general media or social media, as they could during the Boston bombing aftermath. Of course, it would be impossible to curb all risks posed to law enforcement, but even slightly managing the media will create benefits. Restrictions on the traditional media would trickle-down to social media, since the traditional media also disseminates content via social media. Individuals would then have a clearer understanding of the event, thus being less likely to spread rumors or false information.

2. Training

To make the above assignments and press pools fair, the government should require media members to receive proper training in national security situations and only allow these trained personnel to participate in the press pools. This requirement will set a very clear standard so that any questions about who is eligible for the press pooling would be fair and equitable.

Others have noted that the government could restrict on-scene coverage to "only those reporters who have had training in terrorist situations."[115] This restraint by itself might seem like a licensing requirement, which the media would resist. Nevertheless, if combined with the above pooling and geographic restraints, the training requirements set forth clear criteria from which to manage the pools. It also would provide an incentive for journalists to participate in the optional training to expand their own resume and marketability.

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[115] Ghetti, *supra* note 10, at 525.

Training requirements will limit the risk of untrained people giving bad information or sensationalizing reports. It will ensure that only qualified individuals present the news, which would prevent the possibility of errors from misinformation. This restriction would also ensure that newscasters exhibit decorum and professionalism, thus avoiding sensationalized reporting. Limiting reporting to the most seasoned, experienced personnel would temper the story and control the pace of information, because the training would teach personnel the impacts of the reports. Such an arrangement will still inform the public of the news and not be conveyed in a way that would overly dramatize the situation.

Perhaps the training programs could develop as a partnership between major journalism colleges and government agencies. The journalism profession would be involved in creating the programs and such a partnership would improve the quality and acceptance of the programs within the media community.

3. Restraints on Images

Finally, the government should place some restrictions on the type and content of images that the media can disseminate during high-profile events. Images should only be released when they would be helpful, as in Boston when law enforcement officials sought help from the public to track down the suspects. Otherwise, the media should not disseminate graphic images of an attack or pictures of injured victims, which is exactly what terrorists seek to achieve.

These restraints will allow the government to control the free-ranging media and reduce the risk that the media's attention on these events would fuel a future attack. The press could be a tool that officials use to prevent future attacks—as shown by the citizen role in catching the Boston terrorists. However, the media cannot be a free-ranging machine that runs uncontrolled. It can never be fully controlled—nor should it—but the government must adopt these policies to regulate the dissemination of information surrounding qualifying high-profile events, to protect the public safety.

B. Passing Strict Scrutiny

These restrictions would pass strict scrutiny because the state has a valid interest in curtailing some media access to information during national security events. New policies could pass strict scrutiny because of the following:

(1) Preventing death and providing for public safety is a compelling governmental interest;
(2) Policies could be narrowly tailored so that the government would have to invoke these restrictions immedi-

ately following a qualifying event, so that it is not a blanket restriction on the media.

1. Compelling Governmental Interest

First, placing restrictions on media access to terrorist events would pass strict scrutiny because the restrictions support the governmental interest of providing for the public safety. Restrictions would remove an incentive for terrorist attacks. Terrorism feeds on media attention and attention reinforces terrorist behavior, such restrictions would limit the attention and gratification that criminals receive from media coverage of their atrocities.[116] Restrictions on the media would limit the potential for terrorists to feed off the publicity, which is their ultimate goal, and would reduce the risk of future attacks.

By reducing the risks of future attacks, the restrictions would promote economic growth and protect infrastructure. The Boston marathon bombing cost as much as $333 million in damage to the economy.[117] Larger terrorist attacks also could damage or destroy the fixed infrastructure of the country, including roadways, bridges, or airports, causing even more damage. Reducing the risk of future attacks will protect the nation's economic growth and these restrictions would protect lives by mitigating the risk of future attacks.[118] By reducing the threat of a terrorist attack, the government would directly prevent the loss of human life. These restrictions are possible because they would comply with strict scrutiny since the governmental interest in protecting safety and saving lives is compelling.

Finally, there is no true benefit to the public in seeing carnage and devastation in the news. The public needs to know what is happening, but massive media attention only serves the interests of the terrorists. The public would need a warning if a fugitive was on the loose in a given geographical area and posed a danger to residents. But other than the above-described situation, the public does not need to follow a high-profile event in great detail. This restriction will limit the media's ability to investigate and obtain information on its own. This is a permissible restriction because the government has a compelling interest in controlling information to lessen the possibility of future attacks.

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116 *Id.* at 524-25.

117 Bill Dedman & John Schoen, *Adding Up the Financial Costs of the Boston Bombings*, NBCNEWS.COM (Apr. 30, 2013, 5:44 AM), http://usnews.nbcnews.com/_news/2013/04/30/17975443-adding-up-the-financial-costs-of-the-boston-bombings?lite.

118 Ghetti, *supra* note 10, at 524-25 (arguing that "[w]hen media coverage becomes an immediate threat to the lives of potential victims of publicity-seeking crimes, it is very possible that finely tailored government regulation is possible in all four forms: prior restraints, subsequent punishment, access restrictions, and FCC regulations.").

2. Narrowly Tailored

Restrictions on the media would be narrowly tailored as long as the regulations were fair and applied "to all media."[119] In military operations, embedding journalists is a useful compromise because it "promotes free speech principles better than alternative methods of regulating wartime reporting."[120] Thus, a narrowly tailored approach balances the needs of the government and the media. The same principles apply to modern tragedies.

These new policies also are narrowly tailored because they do not create a blanket, default restriction. The government would have to invoke the restrictions in high-profile events. When an event is large and dangerous, the government must quickly determine whether the restrictions are necessary and if so, quickly implement the program via announcements to the media. These restrictions should be adopted only during high profile domestic security events, where the risk of mimicking or repeating is highest. This policy is narrowly tailored because it is not a blanket policy.

C. Confronting Criticism

Press pools and image restrictions would draw criticism from some journalists, as they have in military operations.[121] Moreover, some would argue that the press has a First Amendment right to access public places and inform the public.[122] That is a strong argument in favor of the media's ability to access events that take place domestically, within the Constitution's scope, as opposed to overseas military events.

However, courts have held that media access to battlefields and military operations is inherently more limited than, for example, the media's access to public buildings, parks, or courthouses.[123] Now, terrorist attacks have the potential to convert public streets into quasi-battlefields, as seen in Boston. So the default ability to access public spaces does not apply and the above discussed governmental interests in saving lives and preventing future attacks supplants the media's interest in using public spaces. Thus, the government can regulate because lives and safety are at stake.

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[119] *Id.* at 525.

[120] Elana J. Zeide, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309, 1309 (2005).

[121] Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1564 (S.D.N.Y. 1991).

[122] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (discussing that the "use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

[123] *Nation Magazine*, 762 F. Supp. at 1572 (case in which media challenged a military restriction).

1. Other Doctrines Would Not Work

These enhancements to media law are necessary because other doctrines do not apply. The police secrets doctrine cannot apply because of the quick time period in which these crises develop. The Boston bombing aftermath initially would not fall under the police secrets doctrine since there was initially no ongoing investigation. The terrorists attacked unannounced. By the time the police secrets doctrine would apply, the damage would be done. Therefore, in the age of modern technology and social media, information moves too fast during a high-profile attack for it to become an ongoing investigation that would fall under the doctrine. Media restrictions about ongoing investigations are better suited for more traditional law enforcement functions.

2. Self-Regulation Not Possible

Additionally, the media cannot regulate itself with these matters. Due to the profit motive of media corporations, self-regulation would not yield the best results. Experiences have shown that the media does little to regulate itself with these high-profile stories, as seen with the extensive coverage of the Boston marathon aftermath noted above.[124] Therefore, there must be some teeth to governmental policies and the government must play a role.

Further, these restraints could be in the media's best interests. ABC journalist Brian Ross acknowledged the need to slow down the pace of information during rapid-pace events by stating, "[I]t is much better to withhold information—you get a lot of unreportable information, you hear a lot of rumors."[125] Thus, journalists should not be fundamentally opposed to the idea of some restraints; these restraints would likely gain acceptance, given consistent and fair implementation.

V. Conclusion

Due to developments in technology that increase the speed of media coverage, there is a risk that attention-seeking terrorists will benefit from the modern media environment. The speed and depth of coverage that is possible with modern technology supports the terrorists' goals. Therefore, the government must adopt national legislation that will allow law enforcement officials to implement reasonable restraints on media coverage of high-profile events.

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[124] For an example of recent controversial media coverage of the Boston marathon-bombing suspect, *see infra* Appendix.

[125] Andrea Morabito, *Bombings Coverage Highlights Broadcast-Cable Divide*, Broad. & Cable (Apr. 22, 2013, 12:01 AM), http://www.broadcastingcable.com/article/493021-Bombings_Coverage_Highlights_Broadcast_Cable_Divide.php.

Specifically, limiting the geographic reach of journalists via press pools, requiring training, and imposing image restrictions will help temper the media coverage of major events. Otherwise, future attacks would benefit from saturated, sensational modern media coverage. These restraints will help ensure that media coverage does not incentivize future attacks and will protect the public safety.

APPENDIX—GLORIFYING A TERRORIST?

Rolling Stone magazine created controversy in August 2013 by displaying Dzhokhar Tsarnaev on its cover; many viewers felt that the cover's image of one of the bombing suspects glorified a terrorist.[126] In response to the controversy, the magazine stated that "[o]ur hearts go out to the victims of the Boston Marathon bombing, and our thoughts are always with them and their families," but continued to explain its rationale:

> The fact that Dzhokhar Tsarnaev is young, and in the same age group as many of our readers, makes it all the more important for us to examine the complexities of this issue and gain a more complete understanding of how a tragedy like this happens.[127]

But for many people, that explanation was not satisfactory. Boston mayor Thomas Menino expressed his disappointment that the magazine "rewards a terrorist with celebrity treatment."[128] And a friend of one of the attack's victims noted that the "use of a provocative, borderline sympathetic image and headline of someone who has caused so much pain to our country is appalling, insensitive, and disgusting."[129] Due to the magazine cover, stores such as CVS and Walgreens refused to sell the magazine.[130]

This story would not be restricted based on the new policies suggested in this paper since it does not involve any graphic images and does not involve real-time reporting of an event. Rather, this story fits more squarely into the media's First Amendment protection to cover stories to further a "debate of large proportions," to use the Supreme Court's words from the Pentagon Papers case.[131] Nevertheless, questions remain about whether this story is a purely academic, journalistic investigation into society or an attempt to generate a buzz—and more business—for the magazine's latest issue. That question will likely remain unanswered and will occur again in future contexts. Nevertheless, in a technological age where publicity-seeking criminals and terrorists have innumerable ways to gain media attention, the possibility of even one person using a story as motivation to gain his or her own attention must be a

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126 Janet Reitman, *Jahar's World*, ROLLING STONE, Aug. 1, 2013, *available at* http://www.rollingstone.com/culture/news/jahars-world-20130717.

127 *Id.*

128 Matt Murray & Scott Stump, *Rolling Stone Defends Cover Featuring Boston Bombing Suspect*, TODAY NEWS (July 17, 2013, 4:00 PM), http://www.today.com/news/rolling-stone-defends-cover-featuring-boston-bombing-suspect-6C10660674.

129 *Id.*

130 *Id.*

131 *See supra* Part III.B.

factor in the debate. Thus, while acknowledging the importance of the freedom of the press, society must have informed discussions about that right in relation to the potential for additional harm, in order to devise ways to protect the public safety in the future.

OBAMACARE'S EMPLOYER-SHARED RESPONSIBILITY PROVISION: THE IMPACT ON EMPLOYERS AND EMPLOYEES

Whitney Morrissey*

I. INTRODUCTION

Before Obamacare, the United States was in need of healthcare reform. In 2010, 49.9 million Americans were uninsured,[1] and another 38 million people

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Since this article was written, the Obama Administration announced on July 2, 2013, that the employer-shared responsibility provision of the Affordable Care Act would be delayed until 2015. The administration made this decision based on the considerable amount of concerns they received from employers. *See* Sarah Kliff, *White House Delays Employer Mandate Requirements Until 2015*, WASH. POST (July 2, 2013, 5:51 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/white-house-delays-employer-mandate-requirement-until-2015/.

[1] Emily Smith & Caitlin Stark, *By The Numbers: Health Insurance*, CNN (June 28, 2012, 5:02 PM), http://www.cnn.com/2012/06/27/politics/btn-health-care.

had inadequate health insurance.[2] Combined, nearly one third of Americans lacked the security of available medical care.[3] The Patient Protection and Affordable Care Act, commonly known as the Affordable Care Act ("ACA") or Obamacare, was enacted to address this problem. The ACA was signed into law on March 23, 2010.[4] Some key features of the ACA include the following: consumer protections that eliminate lifetime dollar limits; coverage for preventative services to avoid illnesses; coverage for individuals with pre-existing conditions; coverage for children under their parent(s) until age twenty-six; and other coverage options through the insurance marketplace.[5] One purpose of the ACA is to allow individuals to purchase affordable health insurance who otherwise would not have access to health care because of a pre-existing medical condition or because medical insurance is outside their financial means.

Currently, many people receive health insurance through their employers. "Jobs are the most common source of health insurance in the U.S. and more than 150 million are covered by workplace health benefits."[6] Most Americans receive health insurance through their employers, however according to the U.S. Census Bureau, employer-based health insurance is decreasing.[7] In 1997, 64.4% of the population received health benefits through an employer, but that number decreased to 56.5% in 2010.[8] The percentage was nearly the same in 2011.[9]

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[2] Sherry Glied, *Health Care Crisis: Who is at Risk? The Uninsured*, PBS, http://www.pbs.org/healthcarecrisis/uninsured.html (last visited Nov. 17, 2013).

[3] *Id.*

[4] *Read the Law*, U.S. DEP'T HEALTH & HUM. SERVS., http://www.hhs.gov/healthcare/rights/law/index.html (last visited Nov. 17, 2013).

[5] *Key Features of the Affordable Care Act By Year*, U.S. DEP'T HEALTH & HUM. SERVS., http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html (last visited Nov. 17, 2013).

[6] Dave Jamieson & Jeffrey Young, *Under Health Care Reform, Employers May Slash Worker's Hours to Avoid Mandate*, HUFFINGTON POST (Oct. 10, 2012, 10:31 AM), http://www.huffingtonpost.com/2012/10/10/health-care-reform-part-time-work_n_1952455.html.

[7] Press Release, U.S. Census Bureau, Census Bureau Reports Decline in Employment-Based Health Insurance (Feb. 27, 2013) [hereinafter *Census Bureau Reports Decline*], *available at* http://www.census.gov/newsroom/releases/archives/health_care_insurance/cb13-35.html.

The Census Bureau collects health insurance data from three surveys: 1) CPS ASEC: The Annual Social and Economic Supplement to the Current Population Survey, 2) ACS: The American Community Survey, and 3) SIPP: The Survey of Income and Program Participation. *Health Insurance*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/hlthins/ (last visited Nov. 17, 2013). *See also Description of Income and Poverty Data Sources*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/poverty/about/datasources/description.html (last visited Nov. 17, 2013).

[8] *See Census Bureau Reports Decline*, *supra* note 7.

[9] *Health Insurance, Highlights: 2011*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2011/highlights.html (last visited Nov. 17, 2012) (55.1%).

Not everyone who has a job has access to affordable health care. The U.S. Census Bureau found that the likelihood of receiving health benefits through an employer increased with family income.[10] People in households with a total income below 138% of the poverty level were the least likely to work for an employer that offered health insurance.[11] Conversely, people whose household income exceeded 401% of the federal poverty level were most likely to receive health insurance through an employer.[12] The ACA addresses these issues through various employment provisions requiring employers across the U.S., both large and small, to make changes to their health care coverage and eligibility to employees.

For example, under the ACA, employers have already changed the practice of enrolling employees in health insurance benefits.[13] In 2010, employers were required to automatically enroll their new employees in health care benefits (subject to any waiting periods), and automatically continue benefit enrollment for current employees.[14] Prior to 2010, if employees did not sign up for benefits at a particular time, they were not eligible for the entire year.[15] Beginning in 2014, employers will be required to limit waiting periods to ninety days.[16] A waiting period is the time in which a new employee must wait before he or she is eligible for health care benefits.[17] Other changes include disclosing a summary of benefits and coverage and a uniform glossary.[18]

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[10] *See Census Bureau Reports Decline*, *supra* note 7.

[11] *Id.* According to the Federal Poverty Guidelines of 2013, a family of four earning 133% of the poverty level would earn $31,322 or less. *2013 Federal Poverty Guidelines*, FAMILIES USA [hereinafter *2013 Federal Poverty Guidelines*], http://www.familiesusa.org/resources/tools-for-advocates/guides/federal-poverty-guidelines.html (last visited Nov. 17, 2013).

[12] *See Census Bureau Reports Decline*, *supra* note 7. According to the Federal Poverty Guidelines of 2013, a family of four earning 400% of the poverty level would earn $94,200 or more. *2013 Federal Poverty Guidelines*, *supra* note 11.

[13] Changes in health benefit enrollment applied to employers with 200 employees or more. *Technical Release No. 2012-01, Frequently Asked Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods*, U.S. DEP'T LAB. (Feb. 9, 2012) [hereinafter *FAQs Regarding Automatic Enrollment*], http://www.dol.gov/ebsa/newsroom/tr12-01.html#.UKli3IWHo7A.

[14] *See id.*

[15] *See, e.g.*, *Enrollment Options and Procedures*, HEALTHCOVERAGEGUIDE.ORG, http://healthcoverageguide.org/reference-guide/eligibility-and-enrollment/enrollment-options-and-procedures/ (last visited Nov. 17, 2013).

[16] *See FAQs Regarding Automatic Enrollment*, *supra* note 13.

[17] *Id.*

[18] The summary of benefits is information written in plain language describing the employee's health care benefits, specifically summarizing key features, expectations, and limitations. The uniform glossary is a list of commonly used terms. Employers must fill out and follow procedures that are determined by the Department of Labor; otherwise, they are subject to fines. Fines can include up to $1000 for each employee who did not receive the information in a timely manner. Kristi R. Gauthier, *PPACA's Summary of Benefits and Coverage: Are You Ready?*, FORTIN &

Although employers have made changes to automatic enrollment and will continue to implement changes such as limiting waiting periods, this Article will primarily focus on the employer-shared responsibility provision of the ACA. This Article will analyze the employer-shared responsibility provision, the IRS affordability test under the provision, and whether these are effective.

Section II of this article defines the employer-shared responsibility provision, discusses the affordable Health Insurance Marketplace, and addresses differences in large and small employers. Next, Section III discusses the negative effects of the employer-shared responsibility provision, the IRS regulations on affordability, and its impact. Section III also addresses whether large employers will choose to continue offering health insurance to employees or pay penalties. Finally, Section IV addresses the negative impact of the ACA on jobs.

II. EMPLOYER-SHARED RESPONSIBILITY, THE HEALTH INSURANCE MARKETPLACE, AND LARGE AND SMALL EMPLOYERS

The ACA provides two main changes that will affect employer-based health insurance: (1) the employer-shared responsibility provision; and (2) the implementation of Health Insurance Marketplace.[19] Additionally, the ACA distinguishes between large and small employers for the purposes of employer-shared responsibility.[20]

The employer-shared responsibility provision stipulates that large employers who do not offer "adequate health insurance"[21] to their employees are required to pay an assessment, or penalty, to the Internal Revenue Service

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ASSOCIATES (Sept. 25, 2012), http://fortinassociates.com/2012/09/05/ppacas-summary-of-benefits-and-coverage-are-you-ready/.

[19] *See generally* 26 U.S.C.A. § 4980H (West, Westlaw through P.L. 113-31 approved 8-9-13); *see also* 42 U.S.C.A. § 18032 (West, Westlaw through P.L. 113-31 approved 8-9-13).

[20] *See What If My Business Has 50 or More Employees?*, HEALTHCARE.GOV [hereinafter *Business, 50+ Employees*], https://www.healthcare.gov/what-do-large-business-owners-need-to-know/ (last visited Nov. 17, 2013); *What Is the SHOP Marketplace?*, HEALTHCARE.GOV [hereinafter *Small Businesses, What Is the SHOP Marketplace?*], https://www.healthcare.gov/what-is-the-shop-marketplace/ (last visited Nov. 17, 2013) (HealthCare.gov is managed by the U.S. Centers for Medicare and Medicaid Services, which is a government agency within the U.S. Department of Health and Human Services); *see also* 26 U.S.C.A. § 4980H (West, Westlaw through P.L. 113-31 approved 8-9-13).

[21] *See IRS Proposed Regulations on Employer Mandate May Make Spouses Eligible for ACA Tax Credits*, ANCOR (Jan. 18, 2013) [hereinafter *IRS Proposed Regulations*], http://www.ancor.org/newsroom/news/irs-proposed-regulations-employer-mandate-may-make-spouses-eligible-aca-tax-credits (The Internal Revenue Service determines if the health insurance plan is adequate based on its affordability. A plan is deemed affordable if it does not exceed 9.5% of the employee's household income. If the plan does exceed 9.5% of the employee's household income, then the employee may be eligible for a tax credit to purchase his or her own insurance through the Marketplace and the employer may have to pay a penalty.).

("IRS").[22] This penalty applies even if only one employee receives premium tax credits from the government to buy his or her own health insurance.[23] The purpose of the penalty is to offset part of the cost of the tax credits.[24] According to the ACA, for a large employer that does not offer coverage, the penalty will be $2000 per full-time employee beyond the company's first thirty workers.[25]

Starting in 2014, individuals can purchase health care through the Health Insurance Marketplace ("Marketplace"), also referred to as the Health Insurance Exchange ("Exchange").[26] The Marketplace is a website where individuals and small businesses can purchase affordable health insurance.[27] The Marketplace is similar to websites like Travelocity or Orbitz, where consumers can compare prices to determine which health plan best suits their needs.[28] Through the Marketplace, Americans will be able to learn about the available health insurance plans, how much each plans costs, and which doctors and hospitals they can visit under those plans.[29] "Plans will be divided into four different types, based on the level of benefits: bronze, silver, gold and platinum."[30] However, the Obama Administration is still working out the details of these plans in terms of cost and coverage.[31]

The government is currently in the process of setting up these Marketplaces, with a deadline of October 1, 2013.[32] Each state has the option of running its own marketplace, or it can choose to have the United States Department of Health and Human Services ("HHS") run it.[33] The purpose of

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[22] *What is the Employer Shared Responsibility Payment?*, HEALTHCARE.GOV, https://www.healthcare.gov/what-is-the-employer-shared-responsibility-payment/ (last visited Nov. 17, 2013).

[23] *Id.*

[24] *See id.*

[25] *Id.*; 26 U.S.C.A. § 4980H (a)-(c).

[26] *What Is the Health Insurance Marketplace?*, HEALTHCARE.GOV, http://www.healthcare.gov/law/features/choices/exchanges/index.html (last visited Nov. 17, 2013).

The Health Insurance Marketplace is also referred to as the Health Insurance Exchange. The terms "Exchange" and "Marketplace" are used interchangeably.

See Get Covered: A One-Page Guide to the Health Insurane Marketplace, HEALTHCARE.GOV, https://www.healthcare.gov/get-covered-a-1-page-guide-to-the-health-insurance-marketplace (last visited Nov. 19, 2013).

[27] *Id.*

[28] Julie Appleby, *A Guide To Health Insurance Exchanges*, KAISER HEALTH NEWS (Jan. 10, 2013), http://www.kaiserhealthnews.org/stories/2011/march/30/exchange-faq.aspx.

[29] *What Is the Health Insurance Marketplace?*, *supra* note 26.

[30] Appleby, *supra* note 28.

[31] *Id.*

[32] *Id.*

[33] *See What Is the Health Insurance Marketplace?*, *supra* note 26.

allowing states to run their own Marketplace is to encourage the creation of plans tailored to meet the needs of the local community.[34]

The ACA's provisions will steadily come into effect over the next few years, including the setup of the Marketplace.[35] However, many employers may be concerned with the employer-shared responsibility provision.[36] The ACA distinguishes between large employers and small employers for the purposes of the employer-shared responsibility provision.

A. Large Employers

The ACA defines "large employers" as businesses with fifty employees or more.[37] It does not mandate large employers to offer health insurance to employees; however, the ACA requires employers to pay an assessment or penalty in certain circumstances.[38] These circumstances include: (1) when the employer does not offer *any* health insurance; and (2) when the employer offers health insurance that is unaffordable to some employees, and at least one employee receives government subsidies to purchase health insurance.[39]

A health insurance plan is considered unaffordable if it exceeds 9.5% of an employee's household income, or the plan's share of expenses is less than sixty percent.[40] This standard is known as the affordability test.[41] "The measure for affordability is that the employee's contribution towards the cost of self-only coverage be less than 9.5% of the employee's household income."[42] If the employee's contribution exceeds 9.5%—thereby deeming the plan unaffordable—the employee may apply for tax credits to purchase insurance through the Marketplace.[43]

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[34] *Affordable Insurance Exchanges: Questions and Answers*, U.S. DEP'T HEALTH & HUM. SERVS., available at http://www.mid.ms.gov/pdf/faq_exchange_questions_answers.pdf (last visited Nov. 17, 2013).

[35] *Timeline of the Health Care Law*, HEALTHCARE.GOV, https://www.healthcare.gov/timeline-of-the-health-care-law/#part=1 (last visited Nov. 17, 2013).

[36] *See What is the Employer Shared Responsibility Payment?*, *supra* note 22.

[37] 26 U.S.C.A. § 4980H (c)(2)(A) (West, Westlaw through P.L. 113-31 approved 8-9-13); *Business, 50+ Employees*, *supra* note 20.

[38] *Business, 50+ Employees*, *supra* note 20.

[39] *See* Lara Cartwright-Smith, *Update: Repeal of Free Choice Voucher Provisions*, HEALTH REFORM GPS (Aug. 4, 2011), http://www.healthreformgps.org/resources/update-repeal-of-free-choice-voucher-provisions/ (The federal government subsidy comes in the form of a premium tax credit. The employee can purchase his or her own health insurance through the Exchange if the employer does not offer health insurance or the health insurance is unaffordable.).

[40] *IRS Proposed Regulations*, *supra* note 21; *What is the Employer Shared Responsibility Payment?*, *supra* note 22.

[41] *IRS Proposed Regulations*, *supra* note 21.

[42] *Id.*

[43] *Id.*; *see also What is the Employer Shared Responsibility Payment?*, *supra* note 22.

1. Large Employers and the Marketplace

The ACA states that "qualified individuals" may purchase health insurance through the Marketplace.[44] A qualified individual is someone who is seeking to purchase health insurance, resides in a state with an established Marketplace, and is not currently incarcerated.[45] According to the HHS, individuals and small businesses can purchase insurance through the Marketplace in 2014.[46] Because HHS does not specify which individuals can purchase through the Marketplace, one may infer that anyone is permitted.[47]

Nevertheless, according to other sources, not everyone can initially purchase from the Marketplace.[48] To start, the Marketplace will only be open to small employers, and to individuals eligible for subsidies (tax credits).[49] Most Americans will continue to receive insurance through their employers.[50] The ACA encourages individuals with lower incomes to purchase insurance through the Marketplace by offering premium tax credits or subsidies.[51] Citizens with incomes between 100 and 400% of the federal poverty levels are eligible for these tax credits.[52] In 2013, for a single person, that spectrum ranges from $11,490 to $45,960.[53] For a family of four people, the range is $23,550 to $94,200.[54] Citizens not eligible for tax credits include those who receive public coverage like Medicaid or Medicare and people who receive employer-sponsored health insurance, unless it exceeds 9.5% of their income.[55]

When the ACA first passed, employers were initially required to offer free-choice vouchers to employees receiving subsidies, but that provision has since been repealed.[56] Free-choice vouchers applied to employees with incomes less than 400% of the federal poverty limit and who were not enrolled in an employer-sponsored health care plan.[57] The voucher was an amount equal to what the employer's share would have been if the employee were on the

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[44] 42 U.S.C.A. § 18032(f)(A)-(B) (West, Westlaw through P.L. 113-31 approved 8-9-13).

[45] *Id.*

[46] *See Affordable Insurance Exchanges*, *supra* note 34.

[47] *Id.*

[48] *See, e.g.*, Appleby, *supra* note 28.

[49] *Id.*

[50] *Id.*

[51] *Explaining Health Care Reform: Questions About Health Insurance Subsidies*, HENRY J. KAISER FAM. FOUND. (July 01, 2012), http://www.kff.org/healthreform/upload/7962-02.pdf.

[52] *Id.*

[53] *See generally 2013 Federal Poverty Guidelines*, *supra* note 11.

[54] *Id.*

[55] *Focus on Health Reform*, HENRY J. KAISER FAM. FOUND. (JULY 2012), http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7962-02.pdf.

[56] *See* Cartwright-Smith, *supra* note 39.

[57] *Id.*

employer's plan.[58] If the employer provided these vouchers, it would not have to pay penalties.[59] The vouchers would have shifted more of the coverage cost to employers.[60]

On April 14, 2011, Congress passed the Department of Defense and Full-Year Continuing Appropriations Act, which President Obama then signed into law.[61] Section 1858 of the Appropriations Act repealed the majority of the ACA's provisions on free-choice vouchers.[62] Now, employers are no longer required to provide vouchers to employees for health care coverage costs exceeding 9.8% of their income.[63] Because of this change, employers will have fewer costs shifted to them but employees will have a choice between employer-based plans or buying from the Marketplace.

2. Grandfathered Health Plans

One of the ACA's redeeming features for large employers is grandfathered health plans. Grandfathered plans are health insurance plans that existed before Congress enacted the ACA on March 23, 2010, and has covered at least one person continuously.[64] Grandfathered health plans are not subject to the provisions in the ACA unless the employer makes significant changes to the plan.[65] Grandfathered plans are not required to: (1) provide certain recommended preventative services at no additional cost; (2) offer new protections when appealing claims or coverage denials; or (3) protect an individual's choice of health care providers and access to emergency care.[66] Forty-eight percent of businesses have at least one grandfathered plan, and this does not differ greatly between large and small businesses.[67]

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[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Cartwright-Smith, *supra* note 39 (It is interesting to note the discrepancy from this source. A health insurance plan is considered unaffordable if it exceeds 9.5% of the employee's household income. However, this particular source states a plan is considered unaffordable if it exceeds 9.8% of the employee's household income. One reason for this discrepancy may be that this particular article is against the employer-shared responsibility provision and wants to portray it in a more negative light).

[64] *What If I Have a Grandfathered Health Insurance Plan?*, HEALTHCARE.GOV [hereinafter *Grandfathered Health Plans*] , http://www.healthcare.gov/law/features/rights/grandfathered-plans/ (last visited Nov. 17, 2013).

[65] *Employer Health Benefits: 2012 Summary of Findings*, HENRY J. KAISER FAM. FOUND., at 6 (2012), http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8346-employer-health-benefits-annual-survey-summary-of-findings-0912.pdf.

[66] *Grandfathered Health Plans*, *supra* note 64.

[67] *Employer Health Benefits: 2012 Summary of Findings*, *supra* note 65, at 7.

Grandfathered plans allow large and small employers to implement changes gradually. People generally do not like change; thus, grandfathered health plans can be beneficial to employees because employees are still able to receive the same coverage under their current plans. At the same time, grandfathered plans could have a negative effect on employers because the employer is restricted from making significant changes to the current plans. If the employer makes significant changes in terms of reduction of benefits or increase in cost, then the plan will lose its grandfathered status.[68] Once a plan loses its grandfathered status it is subject to provisions in the ACA.[69] This could mean the plan may be deemed unaffordable under the ACA.[70] Once a plan is subject to the ACA provisions, employers that do not comply with the affordability requirements under the employer-shared responsibility provisions may have to start paying penalties on these plans.

B. Small Employers

The ACA defines small employers as those with fifty employees or fewer.[71] As with large employers, the ACA does not require small employers to offer health insurance to employees. Starting in 2014, small businesses may purchase insurance for their employees through the Small Business Health Options Program ("SHOP").[72] When a small business uses the SHOP Marketplace, it gives the small business an opportunity to obtain better health care options at lower prices for employees.[73] Before the ACA, the U.S. health care system placed a heavy burden on small businesses because of high broker fees and fixed administration costs.[74] Small employers typically paid eighteen percent higher in health care costs per employee than large employers.[75] Because of this, small businesses are less likely to provide health insurance to their employees than large businesses.[76] Small employers pay higher premiums than large employers because premiums can increase if an employee has a serious

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[68] *Grandfathered Health Plans*, *supra* note 64.

[69] *Id.*

[70] *Id.*; *see also What is the Employer Shared Responsibility Payment?*, *supra* note 22; *see also* 26 U.S.C.A. § 36B (c)(2)(C)(i) (West, Westlaw through P.L. 113-31 approved 8-9-13) (providing a plan is deemed unaffordable if the cost of health care exceeds 9.5% of the employee's household income).

[71] *Small Businesses, What Is the SHOP Marketplace?*, *supra* note 20.

[72] *Id.*

[73] *Id.*

[74] *The Economic Effects of Health Care Reform on Small Businesses and Their Employees*, WHITE HOUSE, http://www.whitehouse.gov/assets/documents/CEA-smallbusiness-july24.pdf (last visited Nov. 17, 2013).

[75] *Id.*

[76] *Id.*

health condition.[77] However, starting in 2014, insurers will not be allowed to change premiums based on employee health.[78] This one change will assist small businesses in offering health insurance to employees.

Another change under the ACA includes giving a tax credit to small businesses that offer health insurance.[79] The purpose of the tax credit is to offset the cost of insurance and to provide an incentive for small businesses to offer health insurance.[80] In order to qualify for this tax credit, the small business must meet certain criteria.[81] For example, a small business could qualify for a tax credit if it has fewer than twenty-five full-time equivalent employees who make an average wage of $50,000 or less, and the employer pays fifty percent of the employees' premium costs.[82] Starting in 2014, small businesses can receive tax credits up to fifty percent and non-profit businesses can receive up to thirty-five percent.[83]

The ACA defines large and small employers differently. Large employers are subject to the employer-shared responsibility provision and may be required to pay penalties if their health insurance plans are unaffordable or if they do not offer any health insurance to employees. Conversely, small businesses are not subject to the employer-shared responsibility provision and are not required to pay penalties. On the surface, the employer-shared responsibility provision makes sense because large employers typically generate larger profit margins than small employers.[84] By requiring large employers to pay a penalty, the employer-shared responsibility provision presumes that large employers will stop offering health insurance to employees once individuals are able to purchase insurance through the Marketplace. Conversely, by allowing small businesses to shop on the Marketplace and by providing a tax incentive, the employer-shared responsibility provision would lower costs and encourage small businesses to continue offering health insurance to their employees.

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[77] *See Small Businesses, What Is the SHOP Marketplace?*, *supra* note 20.

[78] Appleby, *supra* note 28.

[79] *See Small Businesses, What Is the SHOP Marketplace?*, *supra* note 20.

[80] *Id.*

[81] *Id.*

[82] *Will I Qualify for Small Business Health Care Tax Credits?*, HEALTHCARE.GOV, https://www.healthcare.gov/will-i-qualify-for-small-business-health-care-tax-credits/ (last visited Nov. 17, 2013).

[83] *Id.*

[84] *See* Grant Houston, *What is the Average Profit Margin for Small Business?*, HOUSTON CHRON., http://smallbusiness.chron.com/average-profit-margin-small-business-23368.html (last visited Nov. 17, 2013) (Generally, small businesses usually have less than five hundred employees and generate less than seven million dollars in annual sales. However, in the U.S., the typical small business has fewer than twenty employees and less than two million dollars in annual sales).

III. The Employer-Shared Responsibility Provision's Effect on Employers and Employees

The ACA provides different incentives for large and small employers to offer health insurance to employees; however, because of the employer-shared responsibility provision, the ACA has a stronger negative impact on large employers and their employees. The provision is codified in the Internal Revenue Code, 26 U.S.C.A. section 4980H; consequently, the IRS and the U.S. Department of Treasury ("Treasury") are in the process of establishing regulations on how to interpret the law.[85] The provision and the IRS regulations may affect spousal and family insurance coverage.[86]

A. Employer-Shared Responsibility and Families

One possible effect of the employer-shared responsibility provision is that large employers may stop offering health insurance to employee's spouses and domestic partners because the law requires employers to offer coverage to the full-time employees and their dependents (usually children up to age twenty six).[87] However, the current legislation is silent with regard to offering insurance to the spouse or domestic partner.[88] In 2012, six percent of large employers excluded spousal coverage.[89] This is up from five percent in 2010.[90] This is known as "working spouse provision" and usually excludes coverage to those spouses who can get health care coverage through their own jobs.[91] However, couples usually prefer to be on the same health plan, and they usually go with the better health plan between the two.[92] The concern is that under the ACA, employers will begin to drop spousal coverage because the law does not

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[85] 26 U.S.C.A. § 4980H (West, Westlaw through P.L. 113-31 approved 8-9-13); *see also* Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. Dep't Treasury (July 2, 2013), http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx; *see generally Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, IRS, http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act (last updated July 18, 2013).

[86] Robert Pear, *Employer Must Offer Family Care, Affordable or Not*, N.Y. Times, Jan. 1, 2013, at A13, *available at* http://www.nytimes.com/2013/01/01/health/employers-must-offer-family-health-care-affordable-or-not-administration-says.html?_r=0.

[87] *IRS Proposed Regulations*, *supra* note 21.

[88] *Id.* (The IRS has determined that "dependents" does not include spouses).

[89] Jen Wieczner, *Why Your Boss is Dumping Your Wife*, Market Watch, Wall St. J. (Feb. 23, 2013), http://articles.marketwatch.com/2013-02-23/finance/37230097_1_spouses-health-coverage-health-insurance.

[90] *Id.*

[91] *Id.*

[92] *Id.*

require employers to offer health care to the spouse or domestic partner.[93] If employers drop spousal coverage, there may be more people purchasing health insurance through the Marketplace. Eventually, the primary source of health insurance could shift from employer-based insurance to health insurance purchased through the Marketplace.

B. Minimum Value and Affordability

The IRS and the Treasury are currently developing affordability and minimum value regulations for the employer-shared responsibility provision.[94] These regulations are relevant in determining whether an employer has to pay a penalty or whether an employee is eligible for a tax credit.[95] The minimum value regulation requires employers to cover at least sixty percent of the total costs of the health plan.[96] The IRS and HHS are developing a minimum value calculator so that employers can input information such as deductibles and co-pays to determine if the plan meets the regulation requirements.[97]

In addition to minimum value, employers are required to offer affordable health insurance plans to full-time employees.[98] A plan is deemed unaffordable if the employee's contribution exceeds 9.5% of his or her household income.[99] When a plan is unaffordable, the employee is eligible to receive a tax credit to purchase insurance through the Marketplace and the employer may have to pay a penalty.[100] A problem arises because the employee's total household income determines a plan's affordability, and that income may be unknown to the employer.[101] To address this issue, the IRS and the Treasury have proposed an affordability safe harbor rule, which allows an employer to measure affordability based solely on the employee's earned wages, not house-

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[93] *Id.*

[94] *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, *supra* note 85.

[95] *Request for Comments on Health Coverage Affordability Safe Harbor for Employers (Section 4980H), Notice 2011-73*, IRS [hereinafter *Request for Comments on Health Coverage*], http://www.irs.gov/pub/irs-drop/n-11-73.pdf (last visited Nov. 17, 2013).

[96] *What is the Employer Shared Responsibility Payment?*, *supra* note 22.

[97] *Id.*

[98] *Id.*; *see also* 26 U.S.C.A. § 36B (c)(2)(C)(i) (West, Westlaw through P.L. 113-31 approved 8-9-13).

[99] *What is the Employer Shared Responsibility Payment?*, *supra* note 22; *see also Request for Comments on Health Coverage*, *supra* note 95, at 2 (The IRS defines household income as the modified adjusted gross income of the employee and any member of the employee's family who filed a tax return. Adjusted Gross Income is gross income minus deductions or changes to your income.).

[100] *Request for Comments on Health Coverage*, *supra* note 95, at 2.

[101] *Id.* at 3.

hold income.[102] Employers would still be required to offer their full-time employees and their dependents the opportunity to enroll in health insurance that meets minimum essential coverage.[103] If the employer meets these requirements, the employer would not be subject to a penalty, even if the employee receives tax credits.[104]

Critics argue that these proposed IRS regulations "offer no guarantee of affordable health insurance for worker's children or spouse."[105] Based on the proposed affordability safe harbor rule, an employer only has to consider individual health care coverage—what the employee would pay for self-only coverage—not family coverage.[106] In other words, the regulation emphasizes offering affordable health care to the full-time employee, but not to the employee's dependents.[107]

Because of this, some critics argue that the employer-shared responsibility provision also provides incentive for employers to drop family coverage.[108] The concern is that if employers drop family coverage, the family may not qualify for tax credits to purchase insurance through the Marketplace.[109] If families do not have access to affordable health care through an employer, they could try to obtain tax credits to purchase insurance independently through the Marketplace. However, eligibility for individual tax credits depends on income level.[110] Individuals whose income is up to 400% of the federal poverty level are eligible for tax credits.[111] If employers decide to drop family coverage, the family may no longer have access to affordable health care through the employer, and depending on their situation, may not qualify for any tax cred-

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[102] *Id.* at 2-5.

[103] *Id.*; *see also* 26 U.S.C.A. § 5000A (West, Westlaw through P.L. 113-31 approved 8-9-13).

[104] *Request for Comments on Health Coverage*, *supra* note 95, at 2-5.

[105] Pear, *supra* note 86.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Health Plan Information for Individuals and Families*, HEALTHCARE.GOV, https://www.healthcare.gov/health-plan-information/ (last visited Nov. 17, 2013); *see also Will I Qualify for Lower Costs on Monthly Premiums?*, HEALTHCARE.GOV, https://www.healthcare.gov/will-i-qualify-to-save-on-monthly-premiums/ (last visited Nov. 20, 2013).

[111] *State-by-State Estimates of the Number of People Eligible for Premium Tax Credits Under the Affordable Care Act*, HENRY J. KAISER FAM. FOUND., http://kff.org/health-reform/issue-brief/state-by-state-estimates-of-the-number-of-people-eligible-for-premium-tax-credits-under-the-affordable-care-act/ (last visited Nov. 17, 2013); *see also 2013 Federal Poverty Guidelines*, *supra* note 11 (People who are eligible for tax credits are lower to middle income individuals and families. According to the Federal Poverty Levels, an individual that earns $45,960 or less is within 400% of the poverty level. A family of four earning $94,200 or less is considered within 400% of the poverty level).

its.[112] This could leave millions of lower middle class people uninsured or without access to affordable health care, and frustrate Congress' intent to expand affordable coverage.[113]

The ACA, the Obama Administration, and Congress have not directly addressed this issue; however, some employers and members of Congress have suggested a compromise.[114] The government would still consider self-only coverage in deciding whether insurance was affordable to an employee.[115] However, if family coverage is too expensive, a family can receive tax credits to purchase insurance through the Marketplace and the employer would not be penalized.[116]

The IRS maintains that the affordability safe harbor rule distinguishes between assessing whether an employer has to pay a penalty as well as assessing whether an employee is eligible for a tax credit.[117] The affordability safe harbor rule (9.5% of the *employee's* income) is only used to determine whether the employer has to pay a penalty.[118] The affordability safe harbor rule is not used to determine if the employee or his family are eligible for tax credits.[119] Eligibility for tax credits would still be based off of household income.[120] For example, in some instances, the employer could treat the offered coverage as affordable (only based on employee's income) to determine if the employer is subject to penalties, while also treating the coverage as unaffordable (based on the household income) for purposes of determining whether the employee is eligible for tax credits.[121]

As an example, consider a family of four people whose yearly household income (modified adjusted gross income) totals $80,000; the husband is a full-time employee earning $50,000, while his wife earns $30,000. Under the employer-shared responsibility provision in the ACA, the 9.5% would be based off the household income of $80,000, which would be $7600. If the family's health care expenses did not exceed $7600, then the plan would be considered affordable. However, under the proposed IRS regulation, the 9.5% would be based only on the husband's income, $50,000, which would be $4750. If his

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112 Robert Pear, *Ambiguity in Health Law Could Make Family Coverage Too Costly for Many*, N.Y. TIMES, Aug. 11, 2012, at A10, *available at* http://www.nytimes.com/2012/08/12/us/ambiguity-in-health-law-could-make-family-coverage-too-costly.html?pagewanted=all.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Request for Comments on Health Coverage*, *supra* note 95, at 2-5.

118 *Id.*

119 *Id.*

120 *Id.*

121 *See id.*

health care expenses do not exceed $4750, then the plan would be considered affordable. By looking only at the husband's income, the plan does not take into consideration the family coverage costs.

The IRS states that this standard is only used to determine if the employer has to pay a penalty, not to determine tax credits.[122] Tax-credit eligibility would still be based on household income.[123] However, in order to determine tax-credit eligibility, it is unclear whether eligibility would be determined by an employee's total income compared to the federal poverty levels (within 400% of the poverty levels) or by the family's health care expenses to establish whether they exceeded 9.5% of their household income. Referring back to the example, if tax-credit eligibility was determined by the federal poverty levels, an $80,000 income for a family of four falls within the federal poverty levels that are eligible for the tax credits; therefore, in this scenario, the family would be eligible for tax credits.[124] However, if this family earned a yearly household income of over $94,000, it would fall outside the federal poverty guidelines, and the family of four would therefore not be eligible for any tax credits.[125] Conversely, if the employer determined tax-credit eligibility based on the family's health care expenses, then in this scenario, the expenses could not exceed $7600.

Some critics say the IRS's regulations on affordability have interpreted the law incorrectly, and that the outcome will leave many families uninsured.[126] However, many businesses agree that the IRS properly interpreted the law because the employer's primary goal is to offer insurance benefits to *employees*, not to the employee's dependents and spouses.[127] Because the employer-shared responsibility provision and the IRS regulations have not gone into effect, it is not entirely clear how they will affect employers, employees and their families, and affordable coverage. It seems that if employers are assessing penalties from a lower amount (employee income rather than household), employers have to offer health care with lower costs. Conversely, if employee tax credits are based on a higher amount (household income), then to qualify, families' health care expenses either have to exceed 9.5% of their income or their income has to fall within the federal poverty limits. If this is the case, then it may be difficult for families whose expenses do not exceed 9.5% or families that earn more than the federal poverty levels to qualify for tax credits.

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122 *Id.*

123 *Id.*

124 *See generally 2013 Federal Poverty Guidelines*, *supra* note 11.

125 The tax credits are designed to offset some of the health care costs. Without tax credits, a family could pay more in out-of-pocket costs and premiums.

126 Pear, *supra* note 112.

127 *Id.*

Families who earn more than the federal poverty limits would still struggle and not have access to affordable health insurance.

C. Is it Cheaper for Employers to Pay the Penalty Instead of Offering Health Care Coverage?

In 2012, the average annual premium for employer-based health insurance was $5615 for single coverage and $15,745 for family coverage.[128] Average employee contributions were $951 per single coverage and $4316 per family.[129] That means employers were contributing $4664 for single and $11,429 for family. Compared to 2011, contributions are up three to four percent.[130]

The penalty for not satisfying the employer-shared responsibility provision is $2000 for each employee over thirty employees.[131] According to the employer-shared responsibility provision, the IRS excludes the first thirty employees when calculating penalties.[132] For example, if an employer has one hundred employees, the IRS would exclude the first thirty employees and only count seventy, so the fine would cost $140,000.[133] Assuming those same one hundred employees were under the single coverage plan, the employer would contribute $466,400 for their health insurance.[134] Based on this scenario, it would cost employers more to offer health care coverage than to pay the penalty.

In 2010, right after Congress passed the ACA, Midwest Business Group completed a survey and found that twenty-four to twenty-eight percent of employers said they would drop health care benefits for employees.[135] Now, in 2013, according to another survey by Midwest Business Group, that number has dropped to only three to four percent.[136] Employers now realize that despite the cost difference between offering health insurance and paying the penalty, they need to continue offering health benefits as a tool that attracts

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[128] *Employer Health Benefits: 2012 Summary of Findings*, *supra* note 65, at 1.

[129] *Id.* at 2.

[130] *Id.* at 1.

[131] *What is the Employer Shared Responsibility Payment?*, *supra* note 22.

[132] 26 U.S.C.A. § 4980H (West, Westlaw through P.L. 113-31 approved 8-9-13).

[133] Carolyn McClanahan, *Will Employers Dump Health Insurance Coverage?*, FORBES (May 30, 2012, 9:44 AM), http://www.forbes.com/sites/carolynmcclanahan/2012/05/30/will-employers-dump-health-insurance-coverage/ (One hundred employees minus the first thirty equals seventy. Seventy employees multiplied by $2000 equals $140,000).

[134] This number is based on the 2012 average annual premium that employers pay toward single coverage ($4664). *Employer Health Benefits: 2012 Summary of Findings*, *supra* note 65, at 1-2. The same 100 employees multiplied by $4664 equals $466,400.

[135] Janean Chun, *Obamacare Forces Small Business to Trim, But Not Eliminate, Health Care Coverage, Survey Says*, HUFFINGTON POST (Oct. 24, 2012, 6:54 PM), http://www.huffingtonpost.com/2012/10/24/obamacare-small-business-health-care-survey_n_2011039.html.

[136] *Id.*

employees to their business.[137] Therefore, although it is cheaper to pay the penalty, companies will most likely continue offering health insurance in order to remain competitive.

D. Is the Employer-Shared Responsibility Provision Effective?

One goal of the ACA is to expand health care coverage so more people have access to affordable health insurance and can purchase insurance through the Marketplace.[138] Eventually, employees may prefer purchasing insurance through the Marketplace because it may be more affordable than the traditional employer-based plan. If this occurs and those employees are the same people whose health care plan fits the definition of unaffordable (exceeds 9.5% of their income),[139] then employers may have to pay penalties.

The purpose of the employer-shared responsibility provision seems to hold employers responsible for continuing to offer health care to employees. The provision could empower people to make decisions about their health care that would best fit their situation. An employee could choose to purchase insurance individually through the Marketplace instead of going through his or her employer. If this occurs, the employer could be required to pay a penalty for not offering health insurance to the employee. The provision appears to punish employers if the employee chooses to purchase insurance from the Marketplace.

On the surface, it appears appropriate to have provisions that require employers to share in the responsibility; however, it seems unjust to have employers pay penalties depending on their employees' choices. Employees should be given a choice between employer-based plans or purchasing insurance through the Marketplace, but not at the expense of the employer. On the other hand, if the employer-shared responsibility provision did not exist, there would be no incentive for employers to offer affordable plans to employees.

As previously discussed, the employer is not required to offer *affordable* health care to an employee's spouse or dependents. These provisions hinge on how the IRS defines affordability. Because the IRS only requires employers to offer employees individual coverage,[140] there is less incentive for the employer to continue offering health care coverage to families. In some situations, if an employee's job-based plan has been deemed affordable and if the employee's family does not fall within the federal poverty limits, they are not eligible for

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[137] *Id.*

[138] *See generally How Does the Affordable Care Act Help People Like Me?*, HEALTHCARE.GOV, https://www.healthcare.gov/how-does-the-affordable-care-act-affect-me/ (last visited Nov. 26, 2013).

[139] *What is the Employer Shared Responsibility Payment?*, *supra* note 22.

[140] Pear, *supra* note 86.

tax credits. This could potentially leave millions of people without affordable insurance. If that becomes the case, the provisions would not be effective and would defeat the purpose of the ACA. One solution may be to balance all of the stakeholders' interests.

> The administration is trying to strike a balance. If the rules allow more people to qualify for subsidies, it would increase costs to the federal government. If the rules require employers to provide affordable coverage to dependents as well as workers, it would increase costs for many employers.[141]

This solution does not specifically mention the increased costs to the individual or to families. The administration should also consider costs to families and individuals when balancing interests.

IV. The ACA's Effect on Jobs

Another concern many people have regarding the ACA is its negative effect on jobs. When the ACA initially passed, critics dubbed the employer-shared responsibility provision the "employer-mandate" provision.[142] Although employers are not forced to offer health insurance to employees, the purpose of the employer-shared responsibility is to provide incentives to large employers to continue offering health insurance. In 2011, critics argued that the "employer-mandate" was a job-killer.[143] They opined that if companies were told they should offer health insurance or pay a fine (penalty), companies would no longer hire any new people.[144] In 2011, the Congressional Budget Office ("CBO") projected a loss of up to 780,000 jobs because of these regulations.[145]

There are two main concerns regarding how the ACA may affect jobs, employers may: 1) cut hours, making full-time workers into part-time, and 2) hire only part-time workers or stop hiring altogether. These problems relate to how an employer's status[146] is determined because the employer may use these methods to avoid being classified as a large employer and thus avoid being subject to potential penalties.

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[141] Pear, *supra* note 112.

[142] *See generally* Janet Trautwein, *Employer Mandate is a Job Killer*, Colum. Daily Trib. (Mar. 22, 2011, 1:10 PM), http://www.columbiatribune.com/opinion/employer-mandate-is-a-job-killer/article_26562cd7-1909-5767-bb15-e4b0b5fce9d4.html.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] The status of the employer refers to whether an employer is considered a large employer or small employer under the ACA. This is based on the number of full-time or full-equivalent employees. *See* sources cited *supra* note 20.

According to the IRS, to determine the status of an employer, an employee is considered full-time if he or she works at least thirty hours a week.[147] Full-time employment is determined by the number of hours the employee is paid, which includes sick time, vacation time, and other paid time off.[148] Employers calculate their full-time employees in a given month by calculating the aggregate number of hours of service (not more than 120 hours for each employee) and dividing the total hours of service by 120.[149] The aggregate includes part-time workers.[150] For penalty purposes, full-time employees are calculated slightly differently; employees are considered full-time if they average thirty hours per week during a month.[151]

Employers with forty to forty-five workers fall on the verge of large employer status, and may cut hours in order to maintain small employer status.[152] Employers may also refrain from hiring any new employees so as not to cross the fifty-employee threshold.[153] If the employer has small employer status, it is not subject to the employer-shared responsibility penalties.[154] However, to determine the status of an employer, it is still required to add the aggregate number of hours for part-time workers.[155] Therefore, when it comes to determining an employer's *status* this method is not very effective because the employer is still required to factor in the part-time workers.

While some employers do not offer health care benefits to part-time workers, there are many others who do. Employers are not required to pay penalties on employees that log an average of less than thirty hours a week.[156] Some employees are concerned that this encourages employers to cut worker hours.[157] These cuts will most likely affect the restaurant and retail industries because low pay and irregular work schedules are already common in these

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147 Stefanie Trilling, *IRS Releases Proposed ACA Regulations on Employer 'Shared Responsibility'*, BLOOMBERG L., http://about.bloomberglaw.com/law-reports/irs-releases-proposed-aca-regulations-on-employer-%E2%80%98shared-responsibility/ (last visited Nov. 17, 2013).

148 Shafeeqa Watkins Giarrantani et al., *IRS Releases Proposed Regulations on Employer Shared Responsibility Under the Affordable Care Act*, NORTON ROSE FULBRIGHT (Jan. 28, 2013), http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=5976&site_id=494.

149 Trilling, *supra* note 147.

150 Giarrantani et al., *supra* note 148.

151 *Id.*

152 Paul Davidson, *Health Care Law May Mean Less Hiring in 2013*, USA TODAY (Dec. 30, 2012, 8:12 PM), http://www.usatoday.com/story/money/business/2012/12/30/health-care-law-jobs/1785641/.

153 *Id.*

154 *Small Businesses, What Is the SHOP Marketplace?*, *supra* note 20; *What is the Employer Shared Responsibility Payment?*, *supra* note 22.

155 Giarrantani et al., *supra* note 148.

156 Jamieson & Young, *supra* note 6.

157 *Id.*

industries and those companies are looking for ways to cut labor costs.[158] For example, Darden Restaurants, the owner of Red Lobster and Olive Garden chains, has already started hiring more part-time workers instead of full-time.[159] According to researchers at the Employee Benefit Research Institute ("EBRI"), the percentage of part-time workers has increased over the past four to five years from seventeen percent in 2007 to twenty-two percent in 2011.[160] However, the EBRI attributes this to business conditions, not necessarily to the ACA.[161] Although some employers in the restaurant industry have started cutting worker hours, it does not appear employers in other industries have followed this practice. It is not entirely clear if employers will start making these changes in 2014. Some employers may take a cautious approach and wait to see how these changes will affect them before changing their work hours and hiring practices.

Recently Congress has proposed new legislation that will provide more protection to part-time workers by requiring employers to pay the employer-shared penalties for part-time workers as well as full-time.[162] This legislation may stop employers' incentive to cut worker hours to avoid paying the penalty. Critics of the ACA still contend jobs will be lost. There has been other recent proposed legislation to completely repeal the employer-shared responsibility provisions of the ACA.[163] The goal of the proposed bill, H.R. 903, cited as the 'American Job Protection Act,' aims to repeal 4980H of the Internal Revenue Code relating to employer-shared responsibility.[164] It will be interesting to see if either of these proposed bills pass through the legislature into law.

V. Conclusion

Overall, the employer-shared responsibility provision of the ACA seems like an effective law because it provides incentives for large employers to continue offering health insurance. However, there is a glitch in the provision based on how the IRS interprets and defines affordability of health plans and how this relates to the employee's family. This glitch could create a situation where the employer does not provide affordable health care to families, forcing them to purchase insurance elsewhere. Depending on a family's income level,

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158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 Part-Time Worker Bill of Rights Act of 2013, H.R. 675, 113th Cong. (2013).

163 Elise Viebeck, *Bills Would Halt Health Law's Employer Mandate*, Hill (Feb. 28, 2013, 6:04 PM), http://thehill.com/blogs/healthwatch/health-reform-implementation/285527-gop-bill-would-quash-health-laws-employer-mandate.

164 American Job Protection Act, H.R. 903, 113th Cong. (2013).

they may not qualify to receive tax credits to purchase insurance through the Marketplace. This could leave millions without access to affordable insurance and could defeat the purpose of the ACA. If this issue is not addressed, the employer-shared responsibility provision will not be effective because it would not fulfill the law's purpose, which is to allow more people access to affordable health care. Conversely, providing a tax credit for small employers creates a good incentive for those employers to continue offering health care to employees and give employees access to more cost-efficient choices.

Lastly, the ACA may negatively affect jobs. Much of this depends on how employers will react once the employer-shared responsibility provision goes into effect. When determining an employer's status, employers have to count part-time employees, so employers may not make any changes to jobs. It is not entirely clear how the ACA will affect jobs because the employer-shared responsibility has not yet gone into effect. However, there is a possibility that certain industries will cut hours to avoid paying the employer-shared penalty. There may be a remedy for this if the newly proposed legislation passes into law.

調和の声

"Chouwa no Koe" or Voices in Harmony: Improving Upon Current U.S.-Japan Alternative Dispute Resolution

Reina R. Garrett*

I. Introduction

Alternative Dispute Resolution ("ADR") plays an invaluable role in the United States' interactions with other sovereign states. The United States resolves many of its disputes with other nations through the Dispute Settlement

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Body of the World Trade Organization.[1] The United States solves other disputes through the frameworks laid out in multilateral treaties,[2] bilateral treaties[3] with individual nations, and United Nations resolutions.[4] The level of success the United States enjoys in each of these legal arrangements varies with the type of agreement and the level of cooperation it has within each one of these systems.

The United States and Japan have long resolved their disputes through ADR: from disputes between private entities, to State-level trade disputes, and beyond.[5] However, the history of ADR between the two countries has been fraught with problems stemming from legal[6] and cultural[7] arrangements that often cause as many difficulties as they solve. There is a need for improvement of the ADR process through harmonization of arbitration laws,[8] increased reciprocity of judgment enforcement, and a willingness on the part of both countries to create and implement a more formalized ADR procedural framework to ensure greater continuity and consistency in the dispute resolution process.

This Article will identify key problems and propose solutions for improving the existing U.S.-Japanese ADR process through the creation of more consistent guidelines and practices as a subset of a general examination of

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[1] *See Dispute Settlement*, WORLD TRADE ORG., http://www.wto.org/ (last visited Oct. 23, 2013) (follow "Dispute settlement" hyperlink); *see also* Pavan Krishnamurthy, Comment, *Effective Enforcement: A Legalistic Analysis of WTO Dispute Settlement*, 5 NW. INTERDISC. L. REV. 191, 195-217 (2012) (for a general discussion of major nations, including the United States' involvement in multilateral agreements).

[2] *E.g.*, North American Free Trade Agreement, 19 U.S.C. §§ 3311-3317 (2006).

[3] *See generally* Anu Bradford, *When the WTO works, and How It Fails*, 51 VA. J. INT'L L. 1, 9-10 (2010).

[4] *See generally International Law*, UNITED NATIONS, http://www.un.org/en/law/index.shtml (last visited Oct. 23, 2013); *Office of Administration of Justice*, UNITED NATIONS, http://www.un.org/en/oaj/ (last visited Oct. 23, 2013); *Member States of the United Nations*, UNITED NATIONS, http://www.un.org/en/members/index.shtml (last visited Oct. 23, 2013).

[5] *See* 9 U.S.C. § 2 (2012); *see infra* Parts II-IV.

[6] *See Japan: Country Profile (Civil Law)*, *in* GUIDE TO FOREIGN AND INTERNATIONAL LEGAL CITATIONS 115, 115 (2d ed. 2009) (explaining that Japan is a code law country using civil law rather than the common law system of the United States, the United Kingdom, Canada, and Australia).

[7] *See generally National Cultural Dimensions*, HOFSTEDE CTR., http://geert-hofstede.com/national-culture.html (last visited Oct. 23, 2013) (providing an explanation of key cultural organizational differences between the United States and Japan, in particular, the power-distance index and the individualism vs. collectivism indexes).

[8] *See* MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 27-43 (1993) (explaining that "Japan is a party to many multilateral and bilateral trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the Friendship, Commerce and Navigation Treaty between the United States and Japan."); Paul M. Secunda, *"Arasoi O Mizu Ni Nagasu" or "Let the Dispute Flow to Water": Pedagogical Methods for Teaching Arbitration Law in American and Japanese Law Schools*, 21 OHIO ST. J. ON DISP. RESOL. 687, 692-93 (2006).

worldwide ADR techniques. Part II of this Article gives a general overview of the history of dispute resolution in each country. Part III examines some of the historical problems between the U.S. and Japan, including cultural and legal differences, and how those differences continue to affect dispute resolution between the two countries today. Part IV makes the case for continued globalization of arbitration while examining counterarguments in the movement. In addition, Part IV applies the need for continuing this legal trend to the relationship between the United States and Japan. Part V proposes a framework for dispute resolution procedures and examines a potential method of implementation of that framework through legal education in both the United States and Japan. Part VI concludes with the acknowledgement that the United States and Japan have all of the tools needed to usher in a new and even more successful era of ADR between the two countries and an encouragement to "internationalize" thinking in each of their respective nations with respect to the legal education system.

II. Previous Compositions

A. The American Composition

1. A Culture of Litigation

Formal dispute resolution is integral to the American idea of justice. The concept of redressing wrongs through a formal, organized system was so important to the founding fathers of the United States that it became part of the country's organizational backbone: its founding documents and laws.[9] The American Constitution itself provides for a Supreme Court that has the power to create other federal courts and to adjudicate disputes brought before it under the laws of the United States.[10] Americans have brought a myriad of claims to the courts, ranging from simple disputes over the rights to a fox,[11] to complex and expensive antitrust litigation involving multiple sophisticated parties.[12]

The American legal system, at its core, is an adversarial one: parties in dispute often turn to the formal legal process to determine who the "winner" will be. Barriers to suit are low.[13] It costs relatively little to sue and to respond

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[9] U.S. Const. art. III, § 1.

[10] U.S. Const. art. III, §§ 1, 2, cl. 1 (requiring basic threshold qualifications such as standing, an active case or controversy, and jurisdiction before the courts may adjudicate any claim).

[11] Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

[12] *See, e.g.*, NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007); Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991).

[13] U.S. Const. art. III, § 2, cl. 1; *see also* Marie Gryphon, *Greater Justice, Lower Cost: How a "Loser Pays" Rule Would Improve the American Legal System*, Manhattan Inst. for Policy Research 3 (Dec. 2008), *available at* http://www.manhattan-institute.org/pdf/cjr_11.pdf

to suit;[14] litigants may retain attorneys or appear on their own behalf,[15] and the courts are open to the adjudication of any legally cognizable claim.[16]

Moreover, the American people are comfortable with the concept of formal legal dispute resolution as part of everyday life. The legal system pervades the American culture: it appears in television shows,[17] movies,[18] novels and non-fiction literature,[19] and even lawyer jokes.[20] The United States is considered the most litigious country in the world, boasting more lawyers and courts than any other legal system in existence.[21] The penetration of the legal system into the American consciousness has led to reliance on the courts to solve both small and large disputes. Courts are often seen as the only way to ensure that justice is done when an individual or group has been wronged.[22] For Ameri-

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(explaining that "[u]nder the American rule, each party to a lawsuit must bear the cost of his own legal representation, win or lose. Virtually every other civil justice system in the world has a loser-pays rule (sometimes called the English rule in American legal circles) for attorneys' fees under which the loser in a civil suit must cover the reasonable legal expenses of the winner."). The cost of suit in the United States is low compared to the cost of suit in Japan. *See For Legal Costs*, SUP. CT. JAPAN, http://www.courts.go.jp/saiban/syurui_minzi/minzi_01_03/ (last visited Nov. 30, 2013) (explaining that in addition to litigation costs, which are paid by the losing party, Japanese courts assess taxes against the parties known as "revenue" stamps and further require the per diem payment of all witnesses); *see also Fee Chart*, OFF. PRIME MINISTER, http://www.kantei.go.jp/jp/sihouseido/kentoukai/access/dai4/9siryo.pdf (last visited Nov. 30, 2013) (for example of a fee schedule).

[14] *See generally* U.S. DIST. COURT CLERK'S OFFICE, FILING YOUR LAWSUIT IN FEDERAL COURT, 4 (2008), *available at* http://www.mied.uscourts.gov/information/prose/proseguide.pdf; *see also* Susan Chira, *Tokyo Journal; To Be Sorely Tried, Try Filing a Lawsuit in Japan*, N.Y. TIMES, (Sept. 01, 1987), http://www.nytimes.com/1987/09/01/world/tokyo-journal-to-be-sorely-tried-try-filing-a-lawsuit-in-japan.html.

[15] 28 U.S.C. § 1654 (2006) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

[16] U.S. CONST. art. III, § 2, cl. 1. *See also* FED. R. CIV. P. 11(c) (providing sanctions for violations of Rule 11(b) such as dismissal of the claim with prejudice, the award of court and attorneys' fees to the opponent, and contempt of court); FED. R. CIV. P. 11(b)(2) (indicating the advancement of "claims, defenses, and other legal contentions [that] are [not] warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" is a violation of Rule 11(b)).

[17] *E.g.*, *Law & Order* (NBC); *Suits* (USA Network); Franklin & Bash (TNT Network); *Hill Street Blues* (NBC).

[18] *E.g.*, A TIME TO KILL (Warner Bros. 1996); THE LINCOLN LAWYER (Lionsgate 2011); TO KILL A MOCKINGBIRD (Universal Pictures 1962); THE PAPER CHASE (20th Century Fox 1973); MY COUSIN VINNY (20th Century Fox 1992); *see also* Hot Coffee (HBO 2011) (documentary).

[19] Famous titles in this genre include: HARPER LEE, TO KILL A MOCKINGBIRD (J.B. Lippincott & Co. 1960); ANDREW J. MCCLURG, 1L OF A RIDE (2d ed. 2013).

[20] *See generally* MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005).

[21] *See id.* at 5.

[22] *See id.*

cans, the judgment of the courts determines not only their rights, but their identity as a nation and as a society.[23] The "law is celebrated: the rule of law is regarded as a defining, essential, and valuable feature of our society."[24]

2. Alternative Paths to Resolution

Notwithstanding their embrace of the formalized legal system, Americans have recognized that there are methods, other than the use of the courts themselves, by which they may settle their disputes. ADR in the United States is nearly as institutionalized as the judiciary. In 1947, Congress enacted the Federal Arbitration Act ("FAA"), which provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[25] In effect, the FAA created an alternative court – like forum through which disputes would be settled, subjecting arbitration agreements enforceable under the FAA to limited judicial review rights.[26] Further, "the FAA widely preempts any existing state laws which are hostile to the enforcement of arbitration agreements evidencing interstate commerce."[27] This is not to say, however, that the FAA is the only arbitration law in the United States. To the extent that they are not federally pre-empted, nearly every state in the Union has its own arbitration laws.[28] One such example is the Superior Court Rule 3.10(a) of Maricopa County, Arizona.[29] Rule

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[23] *Id.*

[24] *Id.*

[25] *See* Secunda, *supra* note 8, at 692-93 (quoting 9 U.S.C. § 2 (2012)); *see also* 5 U.S.C. § 572 (2012).

[26] 9 U.S.C. § 10 (2012).

[27] Secunda, *supra* note 8, at 693.

[28] For a non-exhaustive list of state arbitration statutes, see the following: ALA. CODE § 6-6-1 (2005); ALASKA STAT. § 09.43.010 (2012); ARIZ. REV. STAT. ANN. § 12-3001 (West Supp. 2012); ARK. CODE ANN. § 16-108-201 (2013); CAL. CIV. PROC. CODE § 1280 (West 2007); COLO. REV. STAT. § 13-22-201 (2013); CONN. GEN. STAT. ANN. § 50a-111, *available at* http://www.cga.ct.gov/current/pub/chap_862.htm#sec_50a-111 (specifically referencing international arbitration); DEL. CODE ANN. tit. 10, § 5701 (2012); FLA. STAT. ANN. § 684.0003 (2013); GA. CODE ANN. § 9-9-2 (2012); HAW. REV. STAT. § 658A-7 (2012), *available at* http://www.capitol.hawaii.gov/hrscurrent/Vol13_Ch0601-0676/HRS0658A/HRS_0658A-0007.htm; IDAHO CODE ANN. § 7-901 (2008); 710 ILL. COMP. STAT. 5/2 (2013), *available at* http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1867&ChapterID=51; IND. CODE § 34-57-2-3 (2013), *available at* http://www.in.gov/legislative/ic/code/title34/ar57/ch2.pdf; TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2011).

[29] 17C A.R.S. SUPER. CT. LOCAL PRAC. RULES, Maricopa County, Rule 3.10(a) (2009) ("Amount in Controversy. All civil cases, which are filed with the Clerk of the Superior Court in which the Court finds or the parties agree that the amount in controversy does not exceed $50,000, except those specifically excluded by Rule 72, Arizona Rules of Civil Procedure, shall be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 to 76, Arizona Rules of Civil Procedure.").

3.10(a) requires all litigants filing "small" civil claims to submit first to arbitration as the first step in the dispute resolution process.[30] These litigants are required to submit arbitration paperwork with their other court documents to the Superior Court.[31] While the arbitration awards are appealable, the arbitration process itself is not optional under the Rules of the court.[32] Under these state and federal laws, many contracts written in the United States—whether intrastate, interstate, or international—include arbitration clauses. Commercial and residential rental contracts,[33] service contracts for cellular devices,[34] sales contracts,[35] and employment contracts[36] number among the many types of contracts that now include arbitration provisions.

The FAA extends to foreign arbitration as well as domestic, and incorporates into American law the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.[37] The act also incorporates treaties made by the United States, such as the North American Free Trade Agreement ("NAFTA").[38]

B. Japan: One Harmonious Melody

For hundreds of years, Japanese society—even before Japan became a unified nation under Ieyasu Tokugawa[39]— has embraced the Confucian concept of "wa"[40] in all parts of life, exhorting that all voices should sing in harmony. In embracing this concept, Japanese culture has been staunchly anti-litigation.[41] Since the Tokugawa[42] era, informal dispute resolution methods have prevailed, fostering an atmosphere of sacrificing one's own personal cause for the good of

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[30] *See id.*

[31] *See Arbitration Guide*, JUDICIAL BRANCH OF ARIZ., MARICOPA CNTY., http://www.superiorcourt.maricopa.gov/superiorcourt/civildepartment/arbitration/index.asp (last visited Oct. 23, 2013).

[32] *Id.*

[33] *E.g.*, Gold Coast Mall, Inc. v. Larmar Corp., 468 A.2d 91 (Md. 1983).

[34] *E.g.*, McGreal v. AT&T Corp., 892 F. Supp. 2d 996 (N.D. Ill. 2012).

[35] *E.g.*, Kaplan v. Kimball Hill Homes Fla., Inc., 915 So. 2d 755 (Fla. Dist. Ct. App. 2005).

[36] *E.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000).

[37] 9 U.S.C. § 201 (2012).

[38] *Id.* § 202.

[39] *See Tokugawa Ieyasu (1542-1616)*, BBC, http://www.bbc.co.uk/history/historic_figures/ieyasu_tokugawa.shtml (last visited Oct. 23, 2013) (explaining that Tokugawa Ieyasu unified Japan in 1600 A.D.).

[40] *See* Robert L. Kidder, *Exploring Legal Culture in Law-Avoidance Societies*, *in* PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS 87, 89 (June Starr & Mark Goodale eds., 2002) (explaining that "Wa" loosely translates to "harmony" in English).

[41] *Id.* at 95 ("I thought the Japanese cases would offer unique insight because of Japan's . . . well-documented restrictions on legal-system development . . . and debates about the significance of its unique culture as a law-avoidance force.").

[42] *See Tokugawa Ieyasu (1542-1616)*, *supra* note 39.

society as a whole, regardless of the potential for severe punishment in criminal cases.[43] Any conflict was seen as a failure to coexist in harmony with one's family, friends, and neighbors.[44] Disputes were typically settled through the involvement of a respected elder, who would counsel the parties in dispute to resolve their differences in as quiet a manner as possible in order to avoid bringing shame upon the parties themselves and their families.[45]

The use of the legal system to resolve disputes was taboo, as it would bring great shame on all of the parties involved regardless of the outcome.[46] In fact, for many decades after the official institution of the court system,[47] parties involved in official litigation were required to stay in "suit inns"— essentially official litigation hotels that separated the disputing parties from the rest of society until the dispute was officially resolved.[48] In addition to their lodging functions, suit inns offered some of the first lawyers in Japan in the form of innkeepers.[49] Innkeepers of suit inns in Edo (modern-day Tokyo) were charged by the Japanese government with:

> perform[ing] the following four services for the Shogunate: (1) they delivered the summons issued by the courts; (2) they were responsible for the custody of persons [e]ntrusted to the

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[43] *Japan's Prisons: Eastern Porridge*, ECONOMIST (Feb. 23, 2013), *available at* http://www.economist.com/news/asia/21572257-even-japanese-criminals-are-orderly-and-well-behaved-eastern-porridge (Even in the Japanese criminal system, personal sacrifice for the good of society is so deeply entrenched that many Japanese have confessed to and been imprisoned for crimes they did not commit on the basis that it is better that someone should be wrongly imprisoned than that the crime should go unsolved: "[c]riminal courts in Japan have long relied heavily on confessions for proof of guilt. Though the accused have a right to silence, failure to admit a crime is considered bad sport. Besides, police have strong incentives to extract a confession and, with up to 23 days to interrogate a suspect, the blunt tools to do so, as a stream of disturbing incidents has shown. Detectives tracking down an anonymous hacker extracted separate confessions from four innocent people before being forced in December into a humiliating apology. Court conviction rates are over 99%.").

[44] *See* Kidder, *supra* note 40, at 88.

[45] *Id.*

[46] Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 43 (Arthur T. Von Mehren ed., 1963) ("Traditionally, the Japanese people prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of a dispute and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the wills of the disputants.").

[47] John Henry Wigmore, *VII: Japanese Legal System*, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 480-92 (Wash. Law Book Co. 1936) (1928) (The Tokugawa dynasty, established in the early 1600s, unified Japan and created a unified federal court system based in Edo (Tokyo) and Osaka.).

[48] *See generally* DAN FENNO HENDERSON, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN, VOL. I. 167-69 (1965).

[49] *Id.*

> Inns (*yado azuke*) by the court; (3) they were required to supply food to persons entrusted to them; [and] (4) they had the duty of providing fire protection to the various court buildings.[50]

However, despite the innkeeper's (often unofficial) status as counsel to disputing parties, neither the suit inns nor their keepers were popular.[51] The Japanese consciousness remained focused on dispute settlement through smaller, more private forums.[52]

The stigma of the suit inns—and of the lawyers attached to them—often led to more expedient and usually unofficial dispute resolution because there was such an element of public shame in being made to stay in the suit inns. The suit inns were on the outskirts of town, far away from loved ones, friends, business partners, and the like; parties were willing to reach a speedy end to the conflict even if the resolution reached was in neither of the parties' legal best interests.[53] Finally, if a party was willing to brave the shame and ostracism that came with formal legal dispute resolution, the party often encountered a system that focused heavily on simply making the dispute go away rather than adjudicating the merits of the claim to determine who was actually "right."[54] The societal emphasis on restoring harmony rather than actually deciding a "winner" further encouraged the culture of legal-avoidance and informal resolution.[55] Professor Robert L. Kidder points to other practical reasons for the Japanese culture of non-litigiousness:

> The limited access to lawyers stems from government limits (supported by both local and national bar associations) on the size of the legal profession. A potential litigant's obstacles are

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[50] *Id.* at 168.

[51] *Id.*; *see also* Wigmore, *supra* note 47, at 491 ("A case which could not be settled in [the informal neighborly setting of the "*kumi,*" or neighborhood/extended family unit] was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks.").

[52] *See* HENDERSON, *supra* note 48.

[53] *See generally* Secunda, *supra* note 8, at 702, 702 n.89 (2006) ("Th[e practice of permitting arbitrators to seek settlement of the dispute with the consent of the parties] has been referred to as 'compromising arbitration,' and is clearly derived not only from the conciliation orientation of prior Japanese arbitration law, but also on a larger scale, derives from Japanese cultural norms."); *see also* Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?*, 7 INT'L ARB. L. REV. 54, 54 (2004) ("Rather than litigation, Japan still resolves more of its disputes through (more or less) structured negotiations and ADR processes.").

[54] *See* Kidder, *supra* note 40, at 89.

[55] *Id.* at 95; *see also* Kawashima, *supra* note 46, at 43 ("This attitude is presumably related to the nature of the traditional social groups in Japan . . . . [T]hey are hierarchical in the sense that social status is differentiated in terms of deference and authority.").

> increased by stiff fees imposed by the courts on those who file cases. Costs are raised even further by the glacial pace of Japanese litigation, a condition created by strict Ministry of Justice limits on the numbers of lawyers and judges.[56]

These practices have led to a modern culture of non-litigiousness.[57] Even the modern judicial system strenuously promotes mediation, often requiring parties to go through a court-organized mediation process,[58] whether mediation was contractually provided notwithstanding, before allowing parties to continue with suits.[59] Today, Japanese culture continues to promote resolution outside of the courts, incorporating preemptive advisory opinions from the judiciary, a culture of compliance whether the regulation is seen as fair or not, "lumping it,"[60] and the continuation of public shaming as an enforcement tool. Often, these practices come under negative scrutiny from the outside when foreign parties who have different legal cultures and standards—particularly American litigants—become entangled in the Japanese [non]legal system.[61]

III. Discordant Notes: Historical Problems Between the United States and Japan

Over the years, the United States and Japan have run into problems involving sovereign equality.[62] This includes everything from disagreements about the limited level of discovery the Japanese will allow American parties,[63] even when the suit takes place in the United States; to Japanese issuance of advisory opinions[64] against American operations; to where and whether to litigate at all

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[56] *See* Kidder, *supra* note 40, at 95 (footnote omitted).

[57] *Id.*

[58] *See* Secunda, *supra* note 8, at 695.

[59] *See id.* at 695-96.

[60] *See* Kidder, *supra* note 40, at 89.

[61] 最高裁判所民事判例集 Saikô Saibansho [Sup. Ct.] Mar. 23, 2007, Heisei 18 (kyo) no. 47, 61 Saikô Saibansho minji hanreishû [Minshû] (Japan); 最高裁判所民事判例集 Saikô Saibansho [Sup. Ct.] July 11, 1997, Heisei 5 (o) no. 1762, 51 Saikô Saibansho minji hanreishû [Minshû] 2573 (Japan).

[62] *See generally* Peter B. Rutledge, *Toward A Functional Approach to Sovereign Equality*, 53 Va. J. Int'l L. 181 (2012) (for an explanation of sovereign equality and examples of problems relating to the recognition of sovereign equality).

[63] Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 Asian-Pac. L. & Pol'y J. 1, 16 (2002).

[64] Matsushita, *supra* note 8, at 60-61 (1993) ("[G]overnment agencies in Japan often choose not to use laws directly to accomplish their policy goals but to utilize the more informal process of persuasion when they wish to control the conduct of private enterprises. This informal process of persuasion is often called 'administrative guidance'. . . . '[It] is not legal compulsion restricting the rights of individuals and imposing obligations on citizens. It is a request or guidance on the part of the government within the limit of the task and administrative responsibility of each

and how to enforce a judgment after the conclusion of litigation. In particular, these conflicts tend to center around the enforceability of judgments and clawbacks.[65]

A. Nullity of Judgments

The United States and Japan do not always see eye to eye when it comes to the enforcement of judgments that either perceives to be unfavorable. Both countries have refused to honor judgments rendered in the other's courts, citing various national laws and policy concerns.[66] For example, Japan refused to recognize the rights of Japanese parents to children delivered by a surrogate in Nevada determining that, despite the direct genetic link, the relationship was one that Japanese law did not recognize because the wife had not physically carried and delivered the children.[67] Japan has also historically refused to recognize judgments awarding punitive damages, stating that the construct of punitive damages does not exist in Japanese law and is therefore unenforceable against Japanese companies.[68] This was the case in *Northcon I, Oregon Partnership v. Mansei Kogyo., Ltd. et. al*, a case in which a California court awarded Northcon both compensatory and punitive damages.[69] Northcon then sought enforcement of the judgment against Mansei Kogyo in Japan under Articles 24 and 22(6) of the Civil Execution Code.[70]

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agency as provided for in the establishment laws, asking for a specific action or inaction for the purpose of achieving some administrative objective through cooperation on the part of the parties who are the object of the administration.'") (quoting MITSUO MATSUSHITA & THOMAS J. SCHOENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW 32 (1989)).

[65] *See* Deborah Senz & Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELB. J. INT'L L. 69, 78-79 (2001) (explaining that "[t]he objective of clawback legislation is to allow an entity that is the subject of a foreign judgment executed against its foreign assets, to recover the judgment sum against assets of the foreign judgment creditor that are situated in the local jurisdiction.").

[66] *See* MATSUSHITA, *supra* note 8, at 60-62.

[67] 最高裁判所民事判例集 Saikô Saibansho [Sup. Ct.] Mar. 23, 2007, Heisei 18 (kyo) no. 47, 61 SAIKÔ SAIBANSHO MINJI HANREISHÛ [MINSHÛ] (Japan).

[68] *See* 最高裁判所民事判例集 Saikô Saibansho [Sup. Ct.] July 11, 1997, Heisei 5 (o) no. 1762, 51 SAIKÔ SAIBANSHO MINJI HANREISHÛ [MINSHÛ] 2573 (Japan); *see also* Takao Tateishi, *Recent Japanese Case Law in Relation to International Arbitration*, 17 J. INT'L ARB. 63, 71-72 (2000); *see Northcon I, Oregon Partnership, v. Mansei Kogyo Co., Ltd.*, *in* THE JAPANESE ANNUAL OF INTERNATIONAL LAW NO. 41, 104-09 (1998).

[69] 最高裁判所民事判例集 Saikô Saibansho [Sup. Ct.] Jul. 11, 1997, Heisei 5 (o) no. 1762, 51 SAIKÔ SAIBANSHO MINJI HANREISHÛ [MINSHÛ] 2573 (Japan).

[70] *See* Tateishi, *supra* note 68, at 71 n.31 (explaining that "Article 24 of the Civil Execution Code provides: '(1) the party who wishes to have a foreign judgment enforced shall bring an action for enforcement in the district court of the debtor's domicile, or failing which, in the district court of the place where the object of the claim is located or the debtor's property can be attached . . . . (4) In the enforcement procedure the court must declare that enforcement of the foreign judgment is permissible.'"); *see* MATSUSHITA, *supra* note 8, at 104-09.

The district court granted the award, but the court of appeals reversed the decision, citing public policy against the granting of punitive damages.[71] Ultimately, the Japanese Supreme Court affirmed the appellate court's reversal of the decision to honor the punitive damages awarded to Northcon, stating:

> Where a foreign judgment runs counter to the fundamental principles of the legal order of Japan, it falls foul of the public policy of Japan as provided for in Article 118(3) of CCP. The Japanese law of damages in tort is to recover the loss actually incurred by the injured party in terms of money so that the injured party is to be placed in the same position as if the tort had never been committed. Such deterrent and exemplary measures as materialized in American punitive damages should not come within the scope of basic principles of damages in tort but be considered in criminal or administrative punishments under Japanese law. Hence the Court decides that the punitive damages in the instant case are invalid under Japanese law on the grounds that the run counter to public policy.[72]

This example illustrates some of the difficulties faced in even getting Japanese courts to accept judgments entailing legal exercises that Americans consider integral to their legal system, such as punitive damages.

B. Clawbacks

Further, where the United States has been able to compel Japanese companies with assets in the U.S. to pay judgments that Japan disagrees with, Japan has instituted clawbacks.[73] Clawbacks have allowed the Japanese judiciary to impose—on American litigants with assets inside Japan—a penalty of a value equal to the damages awarded in U.S. trials, in effect nullifying disagreeable judgments.[74] In this way, the Japanese government has discouraged many would-be American litigants from either seeking punitive damage awards or going through the formal U.S. litigation process at all.

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[71] *See Northcon I, Oregon Partnership, v. Mansei Kogyo Co., Ltd., supra* note 68, at 104-09.

[72] *See* Tateishi, *supra* note 68, at 72.

[73] Goss Int'l Corp. v Tokyo Kikai Seisakusho, Ltd., 435 F. Supp. 2d 932, 934 n.3 (N.D. Iowa 2006) (providing information about the existence of clawback statutes in Japan through the fact of Goss's request to "the court to enjoin TKS from bringing an action in Japan to recover damages from Goss under a Japanese clawback statute, *Amerika gasshuukoku no 1916 nen no han futuo renbai hou ni motoduki uketa rieki no henkan gimu tou ni kansuru tokubetsu sochi hou* or 'Special Measures Law Concerning the Obligation of Return of the Benefits and the Like under the United States Antidumping Act of 1916' ('Japanese Special Measures Law')").

[74] *Id.*

C. Other Retaliatory Methods

Many of the potential problems in international dispute resolution between American and Japanese parties do not stem from per se legal consequences, but from the effect of litigation on the willingness of "the Japanese"—Japanese lawyers and litigants—to involve themselves in the "turmoil" they perceive resulting from litigation and arbitration.[75] Although as of 2006 Japan has not refused to honor an arbitration judgment,[76] the social cost of getting involved in litigation of any sort is high.[77] Overzealous American litigators have the potential to be seen by Japanese litigants as bullies.[78]

IV. Is Globalization Really the Right Song?

Scholars have questioned the necessity and propriety of the globalization of the arbitration process.[79] Some countries have gone so far as to pull out of multilateral dispute resolution agreements, such as the International Centre for

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[75] *See generally* Kidder, *supra* note 40.

[76] Secunda, *supra* note 8, at 695 ("In fact, to date, no Japanese court has refused to enforce foreign arbitral awards against Japanese citizens.").

[77] Kidder, *supra* note 40, at 95-96.

[78] Brad Glosserman, *Anti-Americanism in Japan*, *in* Korean Attitudes toward the United States: Changing Dynamics 34, 34-44 (David I. Steinberg ed., 2005) (referencing the criticism of the United States as being overbearing in Japanese national affairs; "[i]n recent years, this critique of the United States has dovetailed with complaints about globalization, which is also condemned by conservatives as an attempt by the United States to smother national identity through the imposition of 'universal values.'"). For more information regarding the smothering of national identity through globalism see, for example, Balmurli Natrajan, *Legitimating Globalization: Culture and Its Uses*, 12 Transnat'l L. & Contemp. Probs. 127, 129-30 (2002), (for the perspective that "'globalization,' if spoken of as non-coercive, performs the same function as ideology: it reproduces power by *naturalizing* it. . . . The naturalization of power is done in two simultaneous moments. One disguises power by representing particular *values* (such as independence, mobility, commodity choice) as general human values available (and desirable) to all, and thus concealing the power relations (and its history) between the 'haves' and the 'have-nots.' The other makes adoption of those values (what is really 'power-in-disguise') appear inevitable or natural (non-coercive, non-imposed, and deriving from laws of human progress), so that any protest or resistance to them will appear reactionary or doomed to failure.").

[79] *See* Glosserman, *supra* note 78, at 35-36 (quoting former professor and social critic Susumu Nishibe that, "since reform of Japan has been discussed only from the American perspective since the end of World War II, I oppose most of the reforms made. . . . The reforms being conducted in the [contemporary] Heisei era will eventually lead to the submersion of Japan.") (internal quotation marks omitted); *see also* Prabhakar Singh, *International Law as "Intimate Enemy"*, 14 Or. Rev. Int'l L. 377, 383 (2012) (quoting Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 Rechtsgeschichte 152, 176 (2011)) (The internationalization of the law is seen as an "intimate enemy" rather than a friend, with the view that the desire to describe international law as such "is not to write [a] 'global history' in which everything is visible—an impossible undertaking—but to diminish the power of blindness.").

the Settlement of Investment Disputes ("ICSID"),[80] accusing the system of being "broken" or skewed to disproportionately represent the interests of large, economically and politically powerful countries.[81] As Professor Alvarez explains:

> [t]he suggestion that committing to international law requires ceding the deployment of one's unilateral power in deference to others–that it requires ceding to multilateral consent and involves a choice between relying on brute force and relying on the rule of law–also haunts international law scholarship.[82]

There is some belief in the international legal community that only "power players"—the United States, the European Union, and sometimes China—are really able to influence the arbitration climate and the direction taken by international dispute resolution organizations.[83] Professor Bradford states that:

> The United States and the European Union (EU) are the unequivocal powers in the WTO system, based on the size of their domestic markets. While their relative economic dominance is gradually diminishing as emerging economies such as China and India continue to grow, the United States and the EU together still account for one-third of all world imports in both manufactured goods and commercial services. In addition, the combined GDP of the United States and the EU still constitutes forty percent of the world's total GDP.
>
> The Great Powers can take advantage of less powerful states' dependence in several ways. At one extreme, Great

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[80] INT'L CENTRE FOR SETTLEMENT INVESTMENT DISPS., https://icsid.worldbank.org/ICSID/Index.jsp (last visited Nov. 4, 2013) (explaining that "ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States. The Convention sets forth ICSID's mandate, organization and core functions. The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes.").

[81] *See* Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L. L.J. 603, 604 (2012) (Ecuadorian president Raphael Correa "denounced the ICSID. . . . proclaim[ing] that his country's withdrawal from the ICSID was necessary for 'the liberation of [his] countr[y] because [it] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank.'").

[82] *See* José E. Alvarez, *Contemporary International Law: An "Empire of Law" or the "Law of Empire"?*, 24 AM. U. INT'L L. REV. 811, 812 (2009) ("Today's legal academy, particularly in the United States, reflects a divide between traditional defenders of international legalism and revisionist upstarts who question the efficacy, or at the very least the democratic legitimacy, of both global treaties negotiated within multilateral institutions and the rules of custom that are backed by the international community.").

[83] Bradford, *supra* note 3, at 9-10.

> Powers can resort to coercive tactics. In the trade domain, coercion has typically consisted of economic sanctions – or threats thereof –or withdrawal of economic benefits, such as removal of a country's Generalized System of Preferences (GSP) status, which allows it to benefit from more favorable tariff schemes. The Great Powers can also use selective incentives and conditional benefits to persuade less powerful countries to adopt their preferred trade policies. They can negotiate conditional trade agreements or use their economic leverage through international institutions such as the World Bank or International Monetary Fund. The Great Powers often extend economic assistance to developing countries on the condition that those countries adopt progressive economic policies and carry out certain institutional reforms. These tactics steer less powerful economies toward regulatory regimes that the Great Powers prefer.[84]

As Professor Bradford indicates, the claim of domineering internationalism is often associated with the United States, which is generally seen as disregarding the rules that everyone else plays by when those rules conflict with its desired course of action.[85] Arguably, the U.S. must then answer to its critics.

The question then becomes whether the globalization dissenters' view of American action and the global arbitration process should be given its own aria, or simply remain a voice in the chorus in the discussion of continuing to harmonize the laws of international arbitration. There are several beneficial reasons to continue the harmonization process. Globalization of the human interaction and commerce will continue, whether the law keeps up or not. For better or for worse, modern society is global; people connect worldwide via transportation, telecommunications, and the internet, sharing ideas and engaging in commerce. Globalization itself is an industry. International legal cooperation may influence the paths that other components of globalization take in a more harmonious, cooperative, and, ultimately, beneficial fashion.

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[84] *Id.* (footnotes omitted).

[85] *Id. See generally* V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980) ("*The Economist* proclaimed, 'The United States Wants to Lay Down The Law on What Foreign Companies Do. Its Law, Nobody Else's.' The article noted the growing number of clashes of sovereignty among nations and that Britain, Holland, West Germany, Australia and Canada, 'not notorious buccaneers in international business,' have legislated and/or taken administrative action to prevent their national companies from complying with American requirements.").

V. Composing a New Melody

> *"[There are] preconditions [that] must be present for any international cooperation to emerge, irrespective of the institutional form that such cooperation ultimately takes. First, powerful states must agree on the need for cooperation and the form that it will take."*[86]

The American and Japanese systems of dispute resolution—while in some ways vastly different—share many of the same elements and goals, including involvement in many of the same trade agreements.[87] The ultimate goal of both systems is to further justice and resolve legal and societal problems. With this in mind, it is in the best interest of both States to embrace the concept of "wa" in their dealings with each other; by creating a framework for resolving disputes between parties of the respective nationalities, the two States would reduce friction and strife.

A. The Basis of the Framework

Both the United States and Japan have mediation built into their legal frameworks. However, it appears each nation disagrees on the other's method regarding dispute resolution. A plan to close the chasm between the two nations in dispute resolution must first involve a comparison of the two mediation systems at a national level, with an eye towards finding and emphasizing the similarities in each process. For example, the Japanese do employ the courts in mediation, bringing both parties before the court to be heard on the issue.[88] This is consistent with the American concepts of due process, fair dealings, and substantial justice: that each person be allowed his or her "day in court."[89] Ideally, the formalized process would incorporate an examination of the legal and cultural needs of both countries, creating requirements that both countries would agree to respect and incorporate into their own bodies of law.

B. Symbolic Capital Adding Value to the Framework

Professors Yves Dezalay and Bryant Garth's discussion of cultural capital and its effect in modern international commercial arbitration adds another valu-

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[86] Bradford, *supra* note 3, at 9 (emphasis in original removed).

[87] Matsushita, *supra* note 8, at 27 ("Japan is a party to many multilateral and bilateral trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the Friendship, Commerce and Navigation Treaty between the United States and Japan.").

[88] *See* Wigmore, *supra* note 47, at 186.

[89] U.S. Const. amend. V, XIV.

able aspect to the dispute resolution framework.[90] "Virtue," or "symbolic capital," as defined by Dezalay and Garth is the "judgment, neutrality, [and] expertise" acquired by key players in the world of international commercial arbitration through "a career of public service or scholarship, [which] is translated into a substantial cash value in international arbitration."[91] This virtue allows prominent arbitrators, known as "grand old men,"[92] to move through many national and international arbitration circles as the legal equivalent of a social butterfly. Their previous experience and training are such that they have always been "international"; these arbitrators, judges, and attorneys' education and experience is grounded in national and foreign legal theory that gives them a greater understanding of the system in which they work.[93] This is aptly summed up by the observation of partner in a New York law firm: "'[y]ou've got to have a platform,' such as an academic position or a partnership in a 'significant law firm,' or 'you can't get into the game.'"[94]

While comments like the above may demonstrate a preference for the traditional "elite"—graduates of Ivy League law schools—there may also be opportunities for those who graduate from law schools with established study abroad programs and those attached to universities with highly rated language and foreign study programs to use these attributes to join the ranks of successful new players[95] in the arbitration world. This "new guard" need not be cut from the traditional cloth to successfully enter the world of international ADR. Any effective framework for creating a new educational system for teaching ADR on the international scale must incorporate the idea of "virtue" and create opportunities for law students and attorneys already in practice to build their own platforms and gain symbolic capital. In this way, legal education could be used as an institutional "bridge" for those seeking to become part of the international arbitration community. In addition, establishing these bridges might serve to create a sort of institutional symbolic capital by creating "houses of arbitration." The law schools and programs created under the new framework would be able to foster the growth of strong arbitrators who would be ready from graduation to work in the international arbitration community: lending the "virtue" of their houses to graduates as they pass into practice. This could be accomplished by giving them an opportunity to gain experience within the

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[90] *See generally* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 1-62 (1996).

[91] *Id.* at 8.

[92] *Id.* at 10.

[93] *Id.* at 19-29 (examples include Professor Pierre Lalive, Judge Gunner Lagergren, Jan Paulsson, Professor Ahmed El-Kosheri, Judge Mohammed Bedjaoui, and Judge Joseph Morris.)

[94] *Id.* at 21 (internal citation omitted).

[95] *See id.*

framework through education, practical training in the form of internships, and learning opportunities in the tribunals, and to make connections through educators and current players in international arbitration generally. Some of these opportunities could include programs that "split" between the United States and Japan.

An example might look like this: A United States law school, upon establishing an accredited program that follows the new framework provides a curriculum that outlines all of the necessary required courses for a student seeking a bar license in the United States to prepare for that state's bar examination. The student would likely first complete all of the required courses at his or her home institution. The home school's counterpart, a Japanese law school, would then provide a curriculum that would effectively allow the American student to immerse himself or herself in the language, culture, and law of Japan for an extended period of time. Under the joint curriculum, the immersion courses—those based in Japanese law rather than language and cultural courses—would be counted as the student's electives toward the credit requirement for graduation at the American institution. During the extended period of time that the American student would be in Japan—two to three semesters—that student would take the same courses that Japanese students are required to take for the Japanese bar exam.

The above example can also work in reverse. Japanese schools could set up immersion programs through schools in the United States designed to give students insight into the legal institutions and culture of the United States in a way that even specialized classes in the home country cannot effectively equal. Initially, likely choices for schools with which Japanese institutions would connect would be prestigious schools at the top of the pecking order: the Ivy League; so-called "Tier 1" schools (schools ranking in the top schools in the country according to U.S. News[96]); and law schools attached to universities with well-established Japanese programs that would be able to contribute a language and cultural education base.

West coast schools would likely benefit from the access to larger Japanese populations[97] and their relative proximity to Japan; some of these schools

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[96] *See generally Best Law Schools*, U.S. NEWS, http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=e5db0b (last visited Nov. 4, 2013); *see also* Kashmir Hill, *The Tier System Within The Law School Tiers (According to Shell Oil)*, ABOVE L., http://abovethelaw.com/2010/05/the-tier-system-within-the-law-school-tiers-according-to-shell-oil/ (last visited Nov. 4, 2013) (for explanation of the meaning of "law school tiers.").

[97] See 2010 U.S. Census results for general Asian population data (showing Asian populations of 4,861,007 out of 37,253,956 total population in California, 525,078 out of 1,360,301 total population in Hawaii, and 481,067 out of 6,724,540 total population in Washington compared to 65,076 out of 3,751,351 total population in Oklahoma, 129,234 out of 5,686,986 total population

already have existing exchange programs that would facilitate the establishment of the Japan-to-United States programs.[98] Success with these initial programs would allow schools across the United States to consider and implement such programs (perhaps with Japanese universities, or even other universities in countries with whom the American schools have connections). The new framework would balance this new educational path with the opportunity for students and practitioners to shape the U.S.-Japanese arbitration culture through increased access to the other country's legal culture.

Building the concept of virtue into the new framework will result in further harmonization. The value added to the framework will build the confidence and capabilities of those entering the system proposed below, creating a point of trust and understanding in the new system in both the United States and Japan.

C. Creating One System

One of the more practical methods to accomplish a joint dispute resolution framework would be the creation of a statutory scheme to be employed uniformly in all disputes involving Japanese and American litigants. There are some specific examples of provisions that might be included. One such would be an agreement that international claims arising between the United States and Japan, or for that matter, all international claims, be submitted to formal mediation or arbitration before being allowed to move into the formal litigation process, without mandating that the outcome of the mediation be imposed as a final judgment as in arbitration (an example might be drawn from the Maricopa County Superior Court's rule on small civil claims).[99] Rules might be established requiring mediating judges to be educated in both American and Japanese law. A mediation/dispute settlement body akin to that of the WTO's Dispute Settlement Body that would become the equivalent of a court of first instance or original jurisdiction[100] in American-Japanese disputes could be created under new Federal Rules. In order to ensure that this comprehensive

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in Wisconsin, and 59,051 out of 4,625,364 total population in South Carolina), *2010 Census Interactive Population Search*, U.S. CENSUS BUREAU, http://www.census.gov/2010census/popmap/ipmtext.php?fl=06 (last visited Nov. 30, 2013).

[98] *See Tokyo, Japan Semester/Year Study Abroad Program*, TEMPLE L. SCH., http://www.temple.edu/studyabroad/programs/semester_year/japan/index.html (last visited Nov. 30, 2013). *See also Study Abroad*, SANTA CLARA U. L. SCH., http://www.scu.edu/studyabroad/options/japan.cfm (last visited Nov. 13, 2013).

[99] 17C A.R.S. SUPER. CT. LOCAL PRAC. RULES, Maricopa County, Rule 3.10(a) (2009).

[100] *See Original Jurisdiction*, LEGAL INFO. INST. CORNELL U. L. SCH., http://www.law.cornell.edu/wex/Original_jurisdiction (last visited Nov. 30, 2013) (defining original jurisdiction as "[a] court's power to hear and decide a case before any appellate review. A trial court must necessarily have original jurisdiction over the types of cases it hears.").

scheme would be fully complied within each country, both nations might sign some form of joint resolution, agreeing to enact these standards as national law in their dealings with the other.

Further, in creating an adjudication body equipped to deal with conflicts arising under this resolution, the legislative scheme could offer incentives to attorneys and judges willing to go through the extra education necessary to achieve the certification necessary to hear and advocate these disputes. There are a few possible methods for implementing this sort of educational program in a way that would achieve the goals of greater socio-cultural and legal awareness and building competence in international law as it specifically relates to the United States and Japan.

For these lawyers and judges already in practice in the United States, one way of accomplishing the extra training and qualification could take the form of specialized continuing legal education ("CLEs"). These CLEs would take the form of a program that the lawyer or judge participating in the new training would use as a substitute for the continuing legal education currently required by the American and state bar associations.[101] For practicing attorneys and judges who wish to complete a more substantial program, the option of an LLM program that would teach a specially focused program dealing with the new tribunals and the laws and methodologies of each country would still exist.

D. Educating for Harmonious Resolution

> *"The examination of legal education in a society provides a window on its legal system. Here one sees the expression of basic attitudes about the law: what law is, what lawyers do, how the system operates or how it should operate."*[102]

Currently, legal education in the United States and Japan focuses on national laws and national practice. In order to increase the success of a Japanese-American ADR path, the two countries would need to develop a joint program that would meet both countries' individual accreditation requirements. The program would be structured to focus on several key aspects of international law in addition to standard legal education: bilateral and multilateral agreements; international business transactions; foreign legal systems (common law, code/civil law, Sharia law, and others); and dispute resolution, including

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[101] *See* ABA MODEL RULE FOR CONTINUING LEGAL EDUCATION WITH COMMENTS, A.B.A. (2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/cle/mcle/aba_model_rule_cle.authcheckdam.pdf; *Mandatory CLE*, A.B.A, http://www.americanbar.org/cle/mandatory_cle.html (last visited Nov. 6, 2013).

[102] Secunda, *supra* note 8, at 687 (quoting John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 859 (1974)).

court-based dispute resolution, mediation, arbitration, and other forms of ADR. Within each of these areas, the particular focus of the program would be in U.S. and Japanese laws and culture, while offering instruction in international law generally, and instruction as to how the U.S.-Japan relationship fits into the international legal culture. This might take the form of, in the United States, the creation[103] and implementation of LLM programs designed to teach the Japanese language, legal history, and current legal scheme in conjunction with courses on Japanese culture and sociological and/or anthropological courses such as legal ethnography.[104] LLM programs like this would undoubtedly start small; a comparatively small number of individuals worldwide speak Japanese,[105] and many of the symbolic capital issues that would lead Japanese schools to choose prestigious "Tier 1" schools with which to associate would also require consideration. However, as with the Juris Doctor programs, Pacific coastal schools might gain a comparative advantage from their proximity to Japan (as compared to East Coast schools). The possibility of beginning this process during Juris Doctor programs also exists. This type of program could be a combination of a standard[106] Juris Doctor degree and a companion Master's degree in legal anthropology. Alternatively, Juris Doctor programs could embrace this system as a concentration within the traditional Juris Doctor programs already offered.[107]

In Japan, "western-style" legal education is already taking hold.[108] The Japanese law degree in many universities is now a graduate level degree with many of the same requirements found in law schools in the United States accredited by the American Bar Association ("ABA").[109] Along with these current programs, a degree program similar to an LLM, teaching current and

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[103] At this time, there is no LLM program in either the United States or Japan that has implemented such a program.

[104] *See Ethnography Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ethnography (last visited Nov. 6, 2013) ("[Th]e study and systematic recording of human cultures;" a "[d]escriptive study of a particular human society. Contemporary ethnography is based almost entirely on fieldwork. . . . Contemporary ethnographies have both influenced and been influenced by literary theory.").

[105] *See Japanese Language*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/301146/Japanese-language (last visited Nov. 6, 2013) (explaining that Japanese is the ninth most spoken language in the world, with approximately 125 million speakers worldwide).

[106] Standard in this case is intended to mean a juris doctor program that teaches American common law in accordance with the accreditation requirements set by the American Bar Association in preparation for state bar examinations in the United States.

[107] For an example of a degree concentration, see *J.D. Degree Program*, ARIZ. ST. U. SANDRA DAY O'CONNOR C. L., http://law.asu.edu/admissions/Admissions/DegreePrograms/JDProgram.aspx (last visited Nov. 6, 2013).

[108] *See* Secunda, *supra* note 8, at 687.

[109] *See id.* at 687-88.

future Japanese attorneys about American legal history and the culture surrounding current U.S. law and dispute resolution methods, could be instituted. The Japanese could also add the type of program discussed above to their own Juris Doctor-equivalent programs as a specialty concentration within the degree.

A third alternative also arises: the concept of jointly-operated schools specifically designed to integrate law and policy could be created in addition to or instead of changing degree programs in existing schools. This might take the form of international schools, with locations in both countries, which have a single curriculum designed to incorporate the educational goals of both in the realm of international law and international dispute resolution. This institution could offer programs equivalent both to undergraduate/pre-law degrees and Master's level degrees that would prepare students for a career as a nonlawyer-arbitrator, nonlawyer service provider, and/or an officer of the U.S.-Japanese joint arbitration tribunals. These programs could also serve as preparation to enter JD programs, giving students an advantage on the international legal playing field. Programs of this nature would go a long way toward dispelling the widely held belief that Americans are often unprepared to enter onto the stage of international law and international arbitration.[110]

Keys to success in the American and Japanese programs would include the creation of a joint and comparative curriculum that would ensure that courses of study taught in both countries would include and emphasize the joint dispute resolution framework. Other key attributes would also include transparency in the exchange of information between the two education systems, possibly through the establishment of a bi-national committee that would evaluate the courses of study to ensure consistency between the two systems. The thrust of this program will not be to create such strict program requirements that the programs are directed essentially top-down by a governmental organization in either or both countries. The program should be designed to allow a standardized framework from which each participating educational institution in the United States and Japan would then be able to create its own unique program subject only to the requirements laid out within the agreed-upon framework. Each school should develop a curriculum through cooperation with the accredi-

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[110] *See* DEZALAY & GARTH, *supra* note 90, at 108-09 (Providing an account of one firm's difficulties in understanding the ways of international arbitration, Professors Dezalay and Garth observed, "[t]he Americans in Paris tried out their own legal weapons, but the arbitration panel—civil-law experts and ICC insiders—paid very little attention to the facts and to the oral examination and cross-examination. The U.S. litigators knew perfectly well how to fight each other. They had no difficulty with intensive fact-gathering, vigorous cross-examination, and even with fighting in multiple forums, through simultaneous litigation commenced in the United States. But neither lawyer knew how to communicate to the ICC world in Paris.").

tation body[111] in its country; the accreditation bodies of the two countries would have an articulated standard for the creation, development, materials/ information, and goals of any program seeking accreditation.

VI. Conclusion: Raising All Voices in Harmony, Singing a New Tune

The United States and Japan, though very different in their laws and culture, share many of the same basic goals. They want the best for their respective citizens, seeking to create legislation and international agreements that will serve and protect the interests of their peoples and their cultures. Importantly, they share the goal of resolving private disputes that involve citizens of both countries in such a way that both sovereign States are willing to enforce judgments of the other while maintaining their own sovereignty and cultural dignity. The path to achieving this goal has, in the past, been fraught with difficulties stemming from their joint history and their legal and cultural differences. These issues have affected the growth of a cooperative system of litigation and ADR between these two countries, creating an opportunity for improvements in the current scheme.

This Article has identified some of the key problems, and possible solutions for improving the existing U.S.-Japanese ADR process through the creation of more consistent guidelines and practices as a subset of a general examination of worldwide ADR techniques. After giving a general overview of the history of dispute resolution in each of the two countries and the cultural history and norms associated with each, this Article examined some of the historical problems between the U.S. and Japan, including cultural and legal differences between the U.S. and Japan and their historical and contemporary effects on bilateral arbitration and litigation in general between the two countries. The case for continued globalization of arbitration was examined, along with its criticisms, ultimately concluding that there is a need for continuing to foster this legal trend in the relationship between the United States and Japan.

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111 *See* ABA, ABA Standards *and* Rules of Procedure *for* Approval of Law Schools, 2013-2014, at v (2013), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf (stating in the preface that "[s]ince 1952, the Council of the Section of Legal Education and Admissions to the Bar ("the Council") of the American Bar Association ("the ABA") has been approved by the United States Department of Education as the recognized national agency for the accreditation of programs leading to the J.D."); *Accreditation*, Japan U. Accreditation Ass'n, http://www.juaa.or.jp/en/accreditation/law_school.html (last visited Nov. 4, 2013) ("The JUAA Law School Standards serve as criteria for JUAA to evaluate and accredit law schools, as well as a guideline for the schools to maintain and improve their quality.").

These countries can achieve the goal of increased cooperation and harmony in the transnational litigation process through the implementation of a comprehensive legal framework that incorporates the laws of both the United States and Japan, all applicable law recognized by the international legal community, and the concerns of each in both the legal and socio-cultural aspects of their respective peoples. In providing for a new and more formalized cooperative dispute resolution body and the required educational programs to train lawyers and judges in both countries to be competent to solve legal disputes within that system, the United States and Japan will be able to avoid some of the pitfalls they have previously experienced in transnational dispute resolution. From this new conception of their relationship in the litigation process, the United States and Japan may be able to combat the historical problems associated with their sometimes-conflicting legal systems, creating a unified system that begins to work before the problems have a chance to appear. The framework will allow both countries to grow together into a more harmonious and beneficial legal arrangement. It will accomplish this by creating a system of harmonization that works from the root foundations of legal education in the two countries, growing into the branches and [cherry] blossoms of actual practice.

The new framework created by the United States and Japan may further have the impact of opening the door to change in the creation and implementation of more effective ADR procedures and techniques in the United States' relations with other countries in Eastern Asia, the Middle East, and beyond. Then, perhaps all voices can sing in one harmony, resolving disputes in a way that creates the most harmonious tune.

Egypt Between Fear and Reform in its Second Revolution: The Failure to Protect the Fundamental Human Rights Over and Over Again

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"*If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise.*"[1]

—The Prophet Mohammad (PBUH)

"*Knowledge is a treasure, but practice is the key to it.*"[2]

—Ibn Khaldoun, Al-Muqaddima

I. Introduction

In essence, a revolution is a human change that leads to political consequences and social outcomes. A revolution means giving primacy to interests or welfare over meaning. A revolution by definition means that a cluster of folks—at a certain moment—become eager to die for dignity, justice, democracy, and freedom.[3] This noble performance is rare, which explains why real rebellions are uncommon in nature throughout human history.[4] Human change

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[1] Quote of The Prophet Mohammad Ibn 'Abdullah (570-632). *Partial Translation of Sunan Abu-Dawad, Book 25: Knowledge, no. 3634*, Ctr. for Muslim-Jewish Engagement, U.S. Cal., http://www.usc.edu/org/cmje/religious-texts/hadith/abudawud/025-sat.php (last visited Nov. 15, 2013).

[2] Quote of Ibn Khaldoun, Al-Muqaddima, scholar and statesman (1332-1406). Al-Muqaddimah Ibn Khaldoun, [The Introduction or Prolegomenon] 21 (Dar AlShaab: 1959, Arabic Source). Ibn Khaldoun was a lawyer, sociologist, economist, and Muslim jurist. He wrote his masterpiece, "Muqaddimah or Prolegomenon," in 1377 A.D. It is the first volume of seven volumes of "Kitab Al-'Ibar." *See* Ibn Khaldoun, The Muqaddimah: An Introduction to History (N.J. Dawood ed., Franz Rosenthal trans., Princeton Univ. Press 1958) (providing an English translation).

[3] *See* Roger Cohen, Op-Ed., *Keeping Egypt's Republic*, N.Y. Times (Nov. 29, 2012), *available at* http://www.nytimes.com/2012/11/30/opinion/global/keeping-egypts-republic.html?_r=0 ("President Mohamed Morsi of Egypt has made a big blunder. His motives may have been honorable—I am inclined to give him the benefit of the doubt—but the error is grave and needs to be rectified.").

[4] Alaa El-Shafei, *The Egyptian Revolution is Failing . . .*, Mass. Daily Collegian (Apr. 9, 2012), http://dailycollegian.com/2012/04/09/the-egyptian-revolution-is-failing/ ("In the Middle Eastern context, Egypt is too important to ignore and so long as the military remains in charge,

is the real achievement of a revolution.[5] Egyptians overcame the obstacle of fear and they will never go back.[6] The military and Muslim Brotherhood's ("Brotherhood") collusion, along with the disintegration of revolutionary forces, delayed the revolt's political attainments.[7] The pathway Egypt takes will have serious consequences for the rest of the Arabian region.[8] Alterations in the Egyptian government's formal structures, internal balance of authority via a check and balance policy, and social involvement in all significant arenas, will require both economic and cultural changes. These changes will be some of the most imperative, strategic, and dynamic forces for redesigning and reformatting the Middle East.[9]

In this regard, the United States is helping to balance efforts and assimilate energies to accomplish and advance two core objectives: (1) preserving a close partnership with Egypt while creating regional stability and security; and (2) supporting Egypt's political and economic transitions toward effective governance and extended economic prospects for its citizens.[10] Without a coherent

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Egypt will be unstable. . . . The United States has a very strong interest in the outcome of Egypt's revolution.").

[5] *See id. See also* Ayman Mohyeldin, *A Year After Egypt's Uprising: One Revolution, Two Perspectives*, TIME WORLD (Jan. 28, 2012), http://content.time.com/time/world/article/0,8599,2105621,00.html. ("[A]fter a popular uprising erupted in Egypt, captivating the world and dislodging its authoritarian President, many in the country question whether the country is on the right path and whether the revolution has delivered on its promise. The unity of . . . revolution has given way to new realities and widening differences among Egyptians.").

[6] *See generally* Mohamed 'Arafa, *Towards a Culture for Accountability: A New Dawn for Egypt*, 5 PHOENIX L. REV. 1 (2011) (elaborating in detail regarding the causes of the January 25, 2011 Egyptian Revolution and proposing a new agenda for political, social, and cultural transformation in Egypt).

[7] *Id.* at 16-17; *see also* As-Safir, *Alaa Al*-Aswany: '*Morsi Has Gone against the Will of the People'*, AL-MONITOR (Nov. 28, 2012), *available at* http://www.al-monitor.com/pulse/politics/2012/11/a-revolutionary-take-on-egypts-crisis.html#ixzz2DsA9dJYB ("Revolutions usually take many years to establish a democratic state. We overthrew Mubarak in less than three weeks. If we compare this achievement to other historical revolutions, we should feel proud of our revolution. The revolution will continue until it is victorious and achieves its goals, God willing.").

[8] Jeremy M. Sharp, CONG. RESEARCH SERV., RL33003, EGYPT: THE JANUARY 25 REVOLUTION AND IMPLICATIONS FOR U.S. FOREIGN POLICY 1-13 (2011), *available at* http://fpc.state.gov/documents/organization/157112.pdf.

[9] *Id. See also* Kayhan Barzegar, *Regional Implications of Egyptian President's Iran Trip*, POWER & POL'Y (Aug. 30, 2012), http://www.powerandpolicy.com/2012/08/30/regional-implications-of-egyptian-presidents-iran-trip/#.Uh4jZ9J03eA ("Egyptian President Mohamed Morsi's trip to Iran for the Non-Alignment Movement (NAM) summit is also an opportunity to enhance Iranian-Egyptian relations and spark resolution of regional issues.").

[10] 'Arafa, *supra* note 6, at 24-26, 30-35. *See also* David Schenker, Op-Ed., *Egypt and the Arab Fall: Egypt's Stock Market has Plummeted, and the U.S. Should Do More to Help*, L.A. TIMES (June 1, 2011), http://articles.latimes.com/2011/jun/01/opinion/la-oe-schenker-egypt-20110601 ("No doubt, there are a lot of bargains to be had in Egypt these days. The question is whether investors will be able to stomach the risk. The Obama administration has taken steps in

and comprehensive economic policy response from the exiled President Mohammad Morsi and his Islamist government, political vagueness deteriorated Egypt's economy. This resulted in high unemployment, rising public debt, corruption, increased pressure on Egypt's foreign cash reserves, and negative influences on foreign relations.[11]

After the second revolution on June 30, 2013, the temporal government and Egyptian interim President 'Adli Mansour, (the Supreme Constitutional Court Chief Justice), must dedicate themselves to protecting the human rights of all individuals around the country.[12] The government should vigorously stand with victims and activists to avert discrimination, uphold political freedom, protect people from inhumane conduct, investigate and expose human rights violations, hold abusers accountable, and bring offenders to justice.[13] Now is the time for those who hold power (i.e., the Egyptian temporal President and the transitional government) to end discrimination and respect international humanitarian and human rights laws.[14] The Muslim Brotherhood, after dominating the Islamists in power and with the assistance of the military, removed President Morsi from office on July 3, 2013.[15] The Brotherhood

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the right direction to help Egypt economically, but for a variety of reasons, it must do more. Today in Egypt, there is an environment of complete uncertainty. Unprecedented political competition threatens to redound to the benefit of Egypt's Islamists, a development with potentially grim local and regional implications. Meanwhile, Egypt is facing a post-revolution economic crisis that could destabilize the nation. It's not news that revolutions hurt economies, but the impact on Egypt has proved especially deleterious.").

[11] This domestic economic and political instability could lead to more problems in the security realm. Egypt faces an increased rate of criminality and civil disorder, as well as heightened security threats. The United States continues to shift its emphasis towards economic progress, job creation, democratic governance reform, anticorruption, and promoting civil society organizations working for political reform.

[12] *See generally* Alex Pearlman, *5 Human Rights Issues Egypt Must Address*, GLOBAL POST (June 8, 2012), http://www.globalpost.com/dispatches/globalpost-blogs/5-human-rights-issues-facing-the-new-egypt#1. ("Egypt struggles to put itself together and human rights priorities are taking a back seat. The history books will write about Tahrir Square and say a lot of things, including the equality and camaraderie of the people who stayed there to fight a tyrant and take back their country. Men and women marched side by side together, Muslims and Christians protected each other . . .").

[13] *Activists Quit Egypt's Human Rights Council over 'Disastrous' Constitutional Declaration*, AHRAM ONLINE (Dec. 3, 2012), http://english.ahram.org.eg/News/59703.aspx ("President Morsi's power-grab constitutional decree 'threatens judicial independence' and draft constitution articles 'violate' human rights.").

[14] *See U.N. Very Concerned about Human Rights in Egypt after Mursi Decree*, AL-ARABIYA NEWS (Nov. 23, 2012), http://www.alarabiya.net/articles/2012/11/23/251358.html ("U.N. Human Rights Commissioner Navi Pillay said Egyptian President Mohammed Mursi's recent decree raises very serious human rights concerns.").

[15] *See id.*; David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken into Military Custody*, N.Y. TIMES, July 4, 2013, at A1, *available at* http://www.nytimes.com/2013/07/04/

wanted to ensure that it would not lose power again, as it did in the second revolution. The Brotherhood aims to rewrite the rules of the game by shaping the political landscape according to their own views.

Demonstrators called for a break from Mubarak and Morsi's offensive rule, but their call remains unanswered. Egyptians have experienced many of the human rights abuses that characterized Mubarak's police state, such as excessive use of force, torture, arbitrary arrests, detentions of citizens, and civilian trials before the military judiciary. Articles by bloggers and journalists illustrate how little has changed.[16] The abuse of power will end only when there is political will to break with the past and transform the country's repressive machinery.[17] A genuine switch in Egypt from a totalitarian regime, with a potential theocratic ideal (religious fascism), to a more open system with democratic institution entails more than restructuring democratic foundations and electoral procedures. It requires restructuring the laws, regulations, and policies, which govern the freedoms of Egypt's general public.

The Egyptian Parliament and government should focus on laws that are incompatible with the basic rights affirmed in both the International Covenant on Civil and Political Rights ("ICCPR"), which Egypt ratified in 1982, and the African Charter on Human and People's Rights ("ACHPR"), which it ratified two years later.[18] Egypt's Assembly should prioritize a full review, reform, and restructuring of these laws and statutes. Accordingly, this Article discusses the imperative legislation and legal provisions, such as police law, penal law, and the code of military justice, which are encumbrances to achieving crucial human rights and thus require amendment or abolishment. Additionally, this Article presents a preliminary analysis of the contradictions in the amended

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world/middleeast/egypt.html?_r=0; Pearlman, *supra* note 12; *see also* 'Arafa, *supra* note 6, at 15-17.

[16] *See, e.g.*, David Keyes, *Hosni Mubarak's Human-Rights Horrors*, DAILY BEAST (Feb. 6, 2011, 6:05 PM), http://www.thedailybeast.com/articles/2011/02/06/egypt-protests-dissidents-on-hosni-mubaraks-human-rights-horrors.html ("Torture, imprisonment, repression of dissent, murder, disappearances—as the Egyptian regime teeters, dissidents and bloggers look back on three decades of abuses. Pundits and politicians shout, 'Better the devil you know!' as Egyptian dictator Hosni Mubarak's regime nears collapse. Mubarak is hailed for not waging war on Israel, allowing some space for civil society, and permitting multi-candidate presidential elections. So why encourage his departure and risk the ascent of a theocratic, fundamentalist Muslim Brotherhood, which could be far worse?").

[17] *Id.*; *See also* David J. Kramer, *Stomping on Human Rights in Egypt*, WASH. POST (Dec. 29, 2011), http://articles.washingtonpost.com/2011-12-29/opinions/35284980_1_tahrir-square-egyptians-military-chiefs.

[18] *See* The International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR]; Organization of African Unity [OAU], *The African [Banjul] Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June 27, 1981) [hereinafter ACHPR].

Egyptian Constitution of 2012. This Constitution provides no guarantees of human rights and fails to safeguard basic rights, especially with respect to the interpretation and contradiction of the language. Finally, this Article concludes by showing that the adopted text of the Constitution has plunged Egypt into even greater political deadlock, and opened the door to a religious theocratic state rather than turning in the right direction after the June 30, 2013, revolution.

II. The Urgency of a Comprehensive Legislative Reform to Ensure Fundamental Human Rights after the January 25 and June 30 Revolutions

A. Brief Background

After the glorious rebellion ousted President Mohammad Hosni Mubarak, the representatives of the transitional government and the Supreme Counsel for the Armed Forces ("SCAF") called for a review of Egyptian legislation that confines freedom of speech, assembly, association, expression, and other public freedoms.[19] During this time, the government gave assurance that human rights were a priority, claiming it wanted "to open a new page on human rights.'"[20] In the meantime, the Minister of Justice agreed that prevailing statutes concerning political freedoms needed review. He stated this review would only take place "insofar as it does not contradict our culture"—without any elucidation on what that meant.[21] In this domain, the starting point for the government must be commitment to Mubarak's human rights reforms made in

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[19] *See generally Gamal Eid: Human Rights Continue to Suffer Since Revolution*, Daily News Egypt (Aug. 8, 2012), http://www.dailynewsegypt.com/2012/08/08/gamal-eid-human-rights-continue-to-suffer-since-revolution/. ("[O]n the seriousness of human rights violations in Egypt since the 25 January revolution. The human rights activist says that while human rights during Mubarak's presidency were systematically abused, after the revolution violations became more egregious. . . . [T]he number of activists in prison today is between 2,000 to 3,000, down from 11,000 in the first seven months following the uprising.").

[20] *See* Human Rights Watch, The Road Ahead: A Human Rights Agenda for Egypt's New Parliament 5 (2012) [hereinafter The Road Ahead: A Human Rights Agenda], *available at* http://www.hrw.org/sites/default/files/reports/egypt0112webwcover.pdf (quoting Prime Minister Essam Sharaf). *See also* Heba Afify, *Rights Groups Says Egypt Still Needs More Change*, Egypt Indep. (June 7, 2011), http://www.egyptindependent.com/news/rights-groups-says-egypt-still-needs-more-change ("In the wake of continuing reports of human rights abuses after the 25 January revolution, the international human rights advocacy organization Human Rights Watch (HRW) is recommending reforms to the Egyptian government . . . that they deem essential to ensure a transition to full democracy.").

[21] The Road Ahead: A Human Rights Agenda, *supra* note 20 (internal quotation marks omitted).

2010 at the Human Rights Council.[22] The Mubarak government accepted a number of recommendations regarding legal reforms, although it failed to implement any of them.

The recommended legal reforms included:

> (1) Continue Egypt's ongoing review of national laws to ensure the laws are in line with international human rights obligations;
> (2) Lift the state of emergency in effect since 1981 and substitute a counterterrorism law that guarantees civil liberties in place of the Emergency Law;
> (3) Expedite reform of the Criminal Code to define "torture" in line with the International Convention Against Torture; and
> (4) Repeal articles in the Penal Code that allow journalists to be imprisoned for their writing as well as amend press provisions in the Penal Code to explicitly state that journalists, reporters, and media professionals in general not be imprisoned or otherwise punished solely for exercising their right to free expression.[23]

In the same vein, freedoms of expression and assembly are also rudiments for free, transparent, and fair elections.[24] In its interpretation of Article 25 of the ICCPR, the United Nations Human Rights Committee, which reviews states' compliance with the covenant, wrote the following:

> In order to ensure the full enjoyment of rights protected by Article 25, the free communication of information and ideas about public and political issues between citizens, candidates, and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[25]

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[22] In February 2010, the Human Rights Council reviewed Egypt's human rights record in the country's first Universal Periodic Review ("UPR"). *See* U.N. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review, 7th Sess., Feb. 8-19, 2010, at 3, U.N Doc. A/HRC/14/17 (Mar. 26, 2010).

[23] *Id.* at 12-20.

[24] *Id*. at 18; *see also* Sarah Lynch, *After Revolution, Egypt's Battle for Human Rights Continues*, USA TODAY (June 6, 2012, 8:12 PM), http://usatoday30.usatoday.com/news/world/story/2012-06-06/egypt-human-rights-protests/55430060/1 ("The gathering was reminiscent of the massive demonstrations . . . during 18 days of revolt in which Egyptians of all persuasions were united in calling for a government that respects human rights and delivers impartial justice.").

[25] U.N. Office of the High Comm'r for Human Rights, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights, and the Right of Equal Access to Public Service*, ¶

One benefit of the SCAF is that it repealed the Emergency Law (Law No. 162 of 1958) and lifted the state of emergency because the circumstances on the ground did *not* rise to the level of a public emergency that threatened the life or the security of the nation; as required by Article 4(1) of the ICCPR to validate imposing a state of emergency.[26] As a result, if the situation ever amounts to an emergency intimidating the life of the country, any new emergency status declaration will be temporary and fixed within a definite period. Additionally, the measures derogating from human rights precautions are obviously identified, strictly necessary and proportionate, and restricted in time and geographical scope to the extent required by the necessities of the situation.[27] In this respect, both the state of emergency and any measures adopted under it should be subject to judicial review, with judges having power to strike down measures that are inconsistent, disproportionate, or no longer essential to

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25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12,1996). Also, the international experts emphasized in this regard that:

> It requires the full enjoyment and respect for the rights guaranteed in Articles 19, 21, and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

Id.

[26] This law permits powers to proscribe public associations and detain citizens indefinitely without charge (subject to *pro forma* judicial review). Further, it allows authorities to detain and prosecute people arbitrarily; try individuals before specific security courts that do not meet international fair trial standards, guarantee no appeal, and are notorious for relying on confessions obtained under coercion, pressure, and torture; and grants the President power to refer civilians to trial before military courts that are fundamentally not autonomous and do not meet fair trial legal norms. *See* David D. Kirkpatrick, *Egypt to Limit Use of* '*Emergency Law*', BOS. GLOBE (Jan. 25, 2012), http://www.boston.com/news/world/middleeast/articles/2012/01/25/egypt_to_limit_use_of_emergency_law/. *See also* David D. Kirkpatrick, *Egypt Military Council Partly Curbs State of Emergency Law*, N.Y. TIMES (Jan. 24, 2012), http://www.nytimes.com/2012/01/25/world/middleeast/egypt-military-council-partly-curbs-state-of-emergency-law.html ("The army officer acting as Egypt's de facto head of state said . . . that the military government would limit its use of extrajudicial arrests and detentions to cases of 'thuggery.'. . . [and] made the pledge[ ] to curb use of Egypt's . . . 'emergency law,' in an apparent attempt to mollify discontent with the heavy-handed police tactics of the military-led government."). *See* 'Arafa, *supra* note 6, at 25-26.

[27] *See* JOE STORK & CLARISSA BENCOMO, HUMAN RIGHTS WATCH, EGYPT: SECURITY FORCES ABUSES OF ANTI-WAR DEMONSTRATORS 7-11 (2003); *Egypt: Free Blogger Held Under Emergency Law*, HUM. RTS. WATCH (Apr. 23, 2010), http://www.hrw.org/news/2010/04/23/egypt-free-blogger-held-under-emergency-law; *Egypt: Jailing 800 Activists Casts Doubt on Elections*: *Mass Arrests Include Would-Be Candidates*; *Military Court Delays Verdict*, HUM. RTS. WATCH (Mar. 30, 2008), http://www.hrw.org/en/news/2008/03/29/egypt-jailing-800-activists-casts-doubt-elections.

address an emergency case that threatens the life of the State, national security, and its national citizens.[28]

B. Clusters of Prevailing Laws Need to be Amended or Abolished

The Code of Military Justice ("CMJ") requires amendment to constrain its jurisdiction to military crimes perpetrated by military officers, thereby ending civilian trials before military courts.[29] Moreover, the amendments must reform the legislative and legal framework that governs freedom of expression, association, and assembly. Such amendments are crucial to establishing the political space for Egyptian political parties, civil society, activist groups, and the media.[30] Specifically, these amendments will allow the media to receive,

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[28] *See* sources cited *supra* note 27. Also, in a 2010 report on Egypt, Special Rapporteur Martin Scheinin stated that:

> [E]xceptional measures can be used only as a temporary tool, with the primary objective of restoring a state of normalcy where full compliance with international standards of human rights can be secured again. A state of emergency almost continuously in force for more than 50 years in Egypt is not a state of exceptionality; it has become the norm, which must never be the purpose of a state of emergency.

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Mission to Egypt*, Human Rights Council, at 5, U.N. Doc. A/HRC/13/37/Add.2 (Oct. 14, 2009) (by Martin Scheinin); *See also Egypt*: *Exceptions to Ending Emergency Law Invite Abuse*, HUM. RTS. WATCH (Jan. 25, 2012), http://www.hrw.org/news/2012/01/24/egypt-exceptions-ending-emergency-law-invite-abuse ("Immediately Free Emergency Law Detainees, Transfer Cases to Regular Courts."); Ernesto Londoño, *Egypt's Infamous Emergency Law Expires*, WASH. POST (May 31, 2012), http://articles.washingtonpost.com/2012-05-31/world/35457650_1_emergency-law-expiration-heba-morayef; Nada Hussein Rashwan, *Egypt's Minister of Information: Emergency Law Revived After Yesterday's Clashes*, AHRAM ONLINE (Sept. 10, 2011), http://english.ahram.org.eg/NewsContent/1/64/20868/Egypt/Politics-/Egypts-minister-of-information-Emergency-lawreviv.aspx; Katherine Weber, *Egypt Lets 'Emergency Law' Expire; Another Step Toward Democracy?*, CHRISTIAN POST (June 1, 2012, 2:12 PM), http://www.christianpost.com/news/egypt-lets-emergency-law-expire-another-step-toward-democracy-75917/.

[29] *See generally* Ahmed Eldakak, *Approaching Rule of Law in Post-Revolution Egypt: Where We Were*, *Where We Are*, *and Where We Should Be*, 18 U.C. DAVIS J. INT'L L. & POL'Y 261, 304-06 (2012).

[30] *See Egypt: A Year of Attacks on Free Expression*, HUM. RTS. WATCH (Feb. 11, 2012), http://www.hrw.org/news/2012/02/11/egypt-year-attacks-free-expression ("The definition of torture in article 126 of the penal code excludes acts of torture for reasons other than the extraction of a confession, such as punishment or intimidation. Egyptian law provides only for sentences ranging from three to five years - penalties not commensurate with the seriousness of the crime of torture. The penal code further gives judges discretion to exercise clemency and reduce sentences, which they frequently do."). *See generally* Sana Ahmed, *A Reawakening of Free Speech in Egypt?*, MEDIA L. & FREEDOM EXPRESSION BLOG (June 3, 2011), http://ibamedialaw.wordpress.com/2011/06/03/a-reawakening-of-free-speech-in-egypt/ ("In the wake of the January 2011 Egyptian revolution, harmonies of free speech and reform echoed through the crowds of *Tahrir* Square and were heard around the world. . . . The people of Egypt have suffered at the mechanics of a forced silencer for years; and at the start of the January 2011 uprisings, freedom of expression and

share, and access information and other political viewpoints, regardless of whether they are confrontational or political in nature.[31] The amendments will also allow Egyptians to contribute in meaningful, democratic processes, including parliamentary and presidential elections.[32] Similarly, amending the Penal Code's definition of "torture" to harmonize with international law and cover all forms of physical and psychological exploitation is crucial.[33] Finally, amendments to the Penal Code must deter police abuse of power by implementing strict penalties.[34]

1. Police Force and Law Enforcement Agent Reform

A main cause of the January 2011 revolution and the June 2013 correcting revolution in Egypt was prevalent horror over decades of systemic police brutality.[35] In Egypt, the Police Central Security Force ("CSF") is the primary division of the ministry of interior installed on the streets.[36] Egyptian police

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the right to information was, once again, severely compromised with the imposition of a total censorship on internet and mobile communications by the former regime. The action received worldwide criticism and pointedly violated Egypt's international human rights obligations under Article 19 of the ICCPR.").

[31] *See* sources cited *supra* note 30.

[32] *See* sources cited *supra* note 30.

[33] *See Egypt: Impunity for Torture Fuels Days of Rage*, HUM. RTS. WATCH (Jan. 31, 2011), http://www.hrw.org/news/2011/01/31/egypt-impunity-torture-fuels-days-rage ("New Government Should Prosecute Police Abuses, Make Clean Break With Torture").

[34] *See* Tim Lister, *Report*: *Torture in Egypt Rampant Amid Impunity for Security Forces*, CNN (Feb. 1, 2011, 9:51 AM), http://www.cnn.com/2011/WORLD/africa/02/01/egypt.torture/index.html; *See also Egypt: Fix Draft Constitution to Protect Key Rights*, HUM. RTS. WATCH (Oct. 8, 2012), http://www.hrw.org/news/2012/10/08/egypt-fix-draft-constitution-protect-key-rights ("Provisions Inconsistent with International Law . . . The draft provides for some basic political and economic rights but falls far short of international law on women's and children's rights, freedom of religion and expression, and, surprisingly, torture and trafficking.").

[35] 'Arafa, *supra* note 6, at 9-12. Egyptians experienced a particularly brutal dose of police abuse on Jan. 28, 2011, ("Friday Anger") when, in a single day, police killed a majority of the 846 protesters at the uprisings in Cairo, Alexandria, Suez, and other cities around Egypt. THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 14 (This number is the official death toll determined by the National Fact-Finding Commission of the January 25 Revolution.); *see also* Sarah El Deeb, *Egypt Revolution Death Toll: Arab Network for Human Rights Information Documents 841 Killed*, HUFFINGTON POST (May 15, 2012, 2:51 PM), http://www.huffingtonpost.com/2012/05/15/egypt-revolution-death-toll-arab-network-human-rights_n_1519393.html ("An Egyptian rights group released . . . the most comprehensive list to date of the more than 800 civilians killed by security forces in . . . uprising that overthrew Hosni Mubarak.").

[36] Throughout the uprising in 2011, the CSF used excessive and lethal force to police and break up civilian protestors. *See Egypt: Protesters' Blood on the Military Leadership's Hands*, HUM. RTS. WATCH (Nov. 22, 2011), http://www.hrw.org/news/2011/11/22/egypt-protesters-blood-military-leadership-s-hands; *Egypt: Cairo Violence Highlights Need to Reform Riot Police*, HUM. RTS. WATCH (July 8, 2011), http://www.hrw.org/news/2011/07/08/egypt-cairo-violence-highlights-need-reform-riot-police.

have been responsible for policing the streets, but have failed to control or regulate protests and public assemblies in recent decades. Instead, they have repeatedly used brutal force and unjustified, inhumane actions against unarmed civilians and national citizens.[37]

Under both the Mubarak and Morsi regimes, district attorneys (prosecutors) consistently closed or even failed to open criminal investigations or conduct interrogations related to excessive use of force by police officers.[38] Consequently, those officers were not held accountable for their actions and were not subject to prosecution, trial, or punishment.[39] However, the international humanitarian law explicitly regulates the international norms of the intentional use of lethal force by law enforcement agents and emphasizes that such force should *only be used* when strictly necessary to protect life, irrespective of whether there are warning shots fired.[40] Further compounding the problem of nonexistent political will to examine or inspect this unlawful use of force, Egyptian police law gives overly extensive powers to Ministry of Interiors' officers.[41] For example, Article 102 of the 1971 Police Law No. 109 provides that:

> Police officers may use necessary force to perform their duties if this is the only means available. The use of firearms is restricted to the following:
> (a) The arrest of:
> (i) All those sentenced to imprisonment for more than three months if they resist or try to escape; and

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[37] For instance, the violent repression of anti-war demonstrators in 2003; the severe beating of peaceful demonstrators against Mubarak's decision to re-run for the presidency in 2005; and the violence against, and intimidation of, voters during the parliamentary elections in late 2005 and 2010, which left some voters dead. THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 14. *See Letter to Secretary of State Condoleeza Rice About Department of State Comments on Egyptian Elections*, HUM. RTS. WATCH (Dec. 2, 2005), http://www.hrw.org/news/2005/12/01/letter-secretary-state-condoleeza-rice-about-department-state-comments-egyptian-elec.

[38] *See generally* HUMAN RIGHTS WATCH, "WORK ON HIM UNTIL HE CONFESSES": IMPUNITY FOR TORTURE IN EGYPT (2011) [hereinafter WORK ON HIM UNTIL HE CONFESSES], *available at* http://www.hrw.org/sites/default/files/reports/egypt0111webwcover_0.pdf.

[39] *Id.* at 2.

[40] *See generally* David P. Fidler, '*Non-lethal*' *Weapons and International Law: Three Perspectives on the Future*, 17 MED. CONFLICT SURVIVAL 194 (2001) (on file with author). *See also* Marie Jacobsson, Senior Legal Adviser on Int'l Law, Swedish Ministry for Foreign Affairs, Non-Lethal Weapons and International Law, Address at the 1st European Symposium on Non-Lethal Weapons at the Fraunhofer ICT (Sept. 25-26, 2001), *available at* http://www.non-lethal-weapons.com/sy01abstracts/v1.pdf (addressing the question of applicable international law regarding the "use of antipersonnel Non-Lethal Weapons (as a means of warfare) or of the antipersonnel use of Non-Lethal Weapons (as a method of warfare)").

[41] *See* Law No. 61 of 1964 (Police Law, amended by Law No. 109 of 1971), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], 10 Nov. 1971 (Egypt) (on file with author).

(ii) All those accused of a crime or against whom an arrest warrant has been issued if they resist or try to escape;
(b) For the protection of prisoners as stipulated in the prisons law, and
(c) To disperse crowds or demonstrations of at least five people if this threatens public security after issuing a warning to demonstrators to disperse. The order to use firearms shall be issued by a commander who must be obeyed.[42]

In the above circumstances, the use of a firearm must be limited to attaining the specified purposes.[43] The interior minister determines which firearm regulations shall be followed, how to issue a warning, and how to use a firearm.[44] The aforementioned provision exceeds international laws and norms by providing overly broad powers to police officers to use firearms.[45] The United Nations ("UN") Basic Principles on the Use of Force and Firearms provides that law enforcement officials "shall, as far as possible, apply non-violent means before resorting to the use of force" and may use force "only if other means remain ineffective."[46] When the use of force is inescapable or mandatory, law enforcement officials must "exercise restraint in such use and act in proportion to the seriousness of the offence."[47]

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[42] *Id*., at art. 102. *See also* Ken Hanly, Op-Ed., *Police Brutality in Egypt Common under President Morsi's Regime*, DIGITAL J. (Oct. 16, 2012), http://www.digitaljournal.com/article/334941#ixzz2EbmrC3wH ("A report by the Nadim Center for Rehabilitation of Victims of Violence, a 20-year-old Egyptian group, lists 200 cases of police brutality in the first 100 days of President Morsi's term."); *See* Amina Ismail & Nancy A. Youssef, *Police Brutality Still Plaguing Egypt*, *Human Rights Group Says*, MCCLATCHY DC (Oct. 15, 2012), http://www.mcclatchydc.com/2012/10/15/171583/police-brutality-still-plaguing.html#storylink=cpy ("Police brutality is as common under newly elected President . . . Morsi as it was under the regime of . . . Mubarak, a new study of incidents has found, raising questions about whether the uprising that toppled Mubarak and gave rise to the first democratic elections in Egypt's history has had any impact on the issue that triggered the anti-Mubarak revolt.").

[43] The policeman must start by warning that he is about to fire and may then have the option to use the firearm.

[44] Law No. 61 of 1964 (Police Law, amended by Law No. 109 of 1971), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], Nov. 10, 1971 (Egypt) (on file with author).

[45] *See* Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990) [hereinafter *Basic Principles on the Use of Force and Firearms*].

[46] *Id.*

[47] *Id.* Principle Nine recites clearly that:

> Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a

Conversely, Egyptian law permits the use of firearms beyond these limitations. For instance, it authorizes police to fire on "crowds" of more than five individuals if they "threaten [sic] public security"—a much wider standard than is endorsed under international law.[48] International law requires a "particularly serious crime involving grave threat to life" to justify the use of firearms against people.[49] Accordingly, the Egyptian parliament should amend Article 102 of the 1971 Police Law No. 109 to restrict the use of lethal force to cases of lawful self-defense or defense of others against the imminent risk or threat of death or serious injury; to avert the commission of a principally serious offense or misconduct comprising crucial threat to life; to arrest a person presenting such a danger and resisting authority; or to impede his or her escape; and only when less extreme means are inadequate to accomplish these objectives.[50] New codes of conduct for policing demonstrations and border crossings that are in line with international freedom of assembly assurances and policing canons are highly recommended.[51]

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person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

[48] Law No. 61 of 1964 (Police Law, amended by Law No. 109 of 1971), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], 10 Nov. 1971 (Egypt) (on file with author).

[49] *Basic Principles on the Use of Force and Firearms*, *supra* note 45.

[50] *See Reform of Egypt's Police Hits a Wall: The Police*, EGYPT INDEP. (Sept. 18, 2011), http://www.egyptindependent.com/news/reform-egypts-police-hits-wall-police (internal quotation marks omitted) ("The police force's job has been to protect the (Mubarak) regime, not the people . . . . Only a genuine purge of the force will bring reconciliation between the people and the police.").

[51] *See generally* Ursula Lindsey, *Pushing For Police Reform in Egypt*, PRI (Nov. 23, 2011, 8:40 AM), http://pri.org/stories/2011-11-23/pushing-police-reform-egypt (internal quotation marks omitted) ("High-ranking police officers are responsible for serious crimes, ranging from torture to killing to withdrawal from their positions and the opening of prisons and killing of prisoners . . . . No one has been held accountable. . . . [The police force] participated in election fraud, spied on and intimidated the regime's political opponents, and tortured citizens. It was also notoriously corrupt."). *See also* Vivian Salama, *Amnesty Reports: Egyptians Still Terrorized by Police, Security Forces*, DAILY BEAST (Oct. 2, 2012, 6:00 AM), http://www.thedailybeast.com/articles/2012/10/02/amnesty-reports-egyptians-still-terrorized-by-police-security-forces.html ("Post-Mubarak police and security forces haven't stopped using excessive, unnecessary, and often deadly force against Egyptian citizens. In two new reports on the abuse, Amnesty International demands that the new government deliver on promised reforms.").

2. Alteration to Military Justice Code to Terminate Military Trials of National Citizens

Military court trials of civilians under the Mubarak administration were restricted to very high-profile political cases.[52] Since the revolt, however, the SCAF has extended the use of military trials as a means to indict and prosecute large numbers of civilians who are accused of criminal offenses or arrested for protesting and criticizing the army.[53]

The CMJ permits the President to refer civilians to military tribunals under the exceptional powers granted to him.[54] In contrast to civilian courts, Military Courts do not have due process guarantees and the only appeal option is the Supreme Military Appeals Court.[55] Further, Articles 5 and 6 of this code provide a wide-ranging basis for referral, stating that "military tribunals will have jurisdiction in cases where the criminal act takes place in an area controlled by the military, or if one of the parties involved is a military officer."[56] One should bear in mind that the military courts in Egypt do not meet the requirements of independence and credibility since judges are under pressure and subject to the instructions and orders of their superior military officers.[57] Military judges must be free from restrictions or pressures imposed by other branches of government.

The UN Basic Principles on the Independence of the Judiciary ("UN Basic Principles") state:

> It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary, [and

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[52] *Egypt: Military Trials Usurp Justice System*, HUM. RTS. WATCH (Apr. 29, 2011), http://www.hrw.org/news/2012/07/15/egypt-president-morsy-should-end-military-trials-civilians. *See also* Eldakak, *supra* note 29, at 304-06; *Egypt: President Morsy Should End Military Trials of Civilians*, HUM. RTS. WATCH (July 15, 2012), http://www.hrw.org/news/2012/07/15/egypt-president-morsy-should-end-military-trials-civilians ("Mohamed Morsy should pardon all those convicted by military courts. He should also order an immediate end to military trials of civilians and refer those against whom there is sound evidence of criminal activity to trial before civilian courts.").

[53] *See Egypt: Retry or Free 12,000 After Unfair Military Trials*, HUM. RTS. WATCH (Sept. 10, 2011), http://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials.

[54] Eldakak, *supra* note 29.

[55] *See* Law No. 25 of 1966 (Code of Military Justice), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], arts. 5, 6, 48 (Egypt) (on file with author).

[56] This broad language has permitted military powers to refer individuals arrested anywhere in Egypt to military tribunals. *Id.*

[57] *See Egypt's Parliament Limits Some Military Trials of Civilians*, USA TODAY (May 6, 2012, 4:43 PM), http://usatoday30.usatoday.com/news/world/story/2012-05-06/egypt-parliament-limits-some-military-trials/54790620/1 ("Egypt's Islamist-dominated parliament . . . approved a ban on the country's . . . [P]resident from sending civilians for trial by military tribunals, but preserving that power for the military itself.").

> the judiciary] shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[58]

Accordingly, judicial verdicts cannot be subject to change by authorities other than superior courts. In support of this premise, the UN Basic Principles states, "[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision."[59] It is worth noting that in a democratic government, the penal military venue should have a preventive and extraordinary scope of application and bind its jurisdiction to the functions that laws allocate to military forces.[60] Thus, military courts should have jurisdiction over military personnel for alleged crimes relating to their military function, but not over civilians.[61] The legal doctrine has progressed in the jurisprudence of international human rights organizations such that the jurisdiction of military tribunals over civilian citizens breaches the due process assurances protected in Article 14 of the ICCPR.[62]

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[58] *See* Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Spain, Aug. 26-Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary*, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[59] *Id.*; Law No. 25 of 1966 (Code of Military Justice), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 4 (Egypt) (on file with author).

[60] *See* Ahmed Aboul Enein, *No to Military Trials Pressure on Morsy*, DAILY NEWS EGYPT (July 9, 2012), http://www.dailynewsegypt.com/2012/07/09/no-to-military-trials-pressure-on-morsy/ ("No Military Trials movement called on the president to free all of those facing 'unjust' trials at the hands of the SCAF").

[61] *See Egypt: Retry or Free 12,000 After Unfair Military Trials*, *supra* note 53; *see also* Mohannad Sabry, *Military Trials Threatens Egypt's Democracy*, GLOBAL POST (Nov. 24, 2011), http://www.globalpost.com/dispatch/news/regions/middle-east/egypt/111123/military-trials-threaten-egypts-democracy ("Through three decades of iron-fisted rule, Hosni Mubarak suspended the rights of . . . civilians and ordered them to face military tribunals in a campaign to crush the Islamist opposition that threatened his rule. The military courts, which were empowered by Egypt's so-called Emergency Law, were seen as a violation of the Egyptian constitution and of international law and their use ignited a firestorm of criticism by human rights activists around the world.").

[62] *See* United Nations, Human Rights Comm., General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007). Within the General Comment interpreting Article 14, the Human Rights Committee clarified that:

> Trials of civilians by military or special courts should be exceptional, *i.e.* limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offenses at issue the regular civilian courts are unable to undertake the trials.

Id. (footnote omitted).

Consequently, the wide jurisdiction of the military courts allows them to focus on cases involving prosecution of military staff and allows the impunity that such personnel enjoy from sanctions for grave human rights transgressions.[63] The Egyptian Congress should amend the CMJ to limit the jurisdiction of military courts to trials of military individuals charged with offenses that solely relate to military affairs. In this regard, amendments should explicitly allow the public prosecuting attorney to inspect complaints concerning military misuse, meaning civilian courts may try army's members in cases of mistreatment and abuse.

3. Amendment of Penal Code, Media Statutes, Association Law's Human Rights Various Provisions

It is a well-known standard of international law that the rules of penal law relating to criminalization and penalization are substantive and concerned with the State's right to punish offenders, the urgency of that right, its extent, and its extinction.[64] Egypt's Penal Code and Press Law comprise provisions that offer prison penalties and fines for peaceful speech, speech considered offensive to individuals or state institutions, and any speech deemed liable to disturb the public order or harmful to Egypt's image.[65]

These legal provisions permit a courthouse to convict any person whose speech it deems "insulting" or "harmful."[66] They also include provisions proscribing speech that "spreads false information," "harms public morals," or "supports" change to the existing political stability or order."[67] Another well-

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[63] *See* Sabry, *supra* note 61.

[64] *See generally* Ahmad 'Awad Belal, *Mabad'e Kanun Al-'Uqubat Al-Masry*: *Al-Kesm Al-'Amm* [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK I: THE THEORY OF CRIMINAL OFFENCES] (2004/Arabic & English Source) ("It is understood that criminal law is not a mere compellation of legal sanctions, for violations of legal rules are not necessarily criminal offenses, and sanctions prescribed for them are not necessarily criminal sanctions.") (on file with author).

[65] *See* Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE] (Egypt); *see*, *e.g.*, Law No. 156 of 1990 (Egypt Press Law, amended by Law No. 148 of 1980), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE] (Egypt); Law No. 76 of 1970 (Journalist Syndicate law), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE] (Egypt); Law No. 93 of 1995 (Press law), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE] (Egypt); Law No. 96 of 1996 (Press law), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE] (Egypt); and Law No. 20 of 1936 (Imprints Law), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE] (Egypt). *See also* Amira Abdel Fattah, *Press Freedom in Egypt* (June 2008) (M.A. thesis, The American University in Cairo), *available at* http://www.anhri.net/en/wp-content/uploads/2012/02/PRESS-FREEDOM-IN-EGYPT.pdf.

[66] *See e.g.*, Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 80(d) (Egypt).

[67] *See*, *e.g.*, *id.* art. 102(bis).

known standard of international law is that decriminalizing all speech, except that which provokes imminent violence, is the best way to protect freedom of expression.[68] In that domain, imprecisely and vaguely defined parameters on substantive speech can lead to discriminatory enforcement.[69] Press and media heads that supported, justified, or at least covered up and failed to disclose instances of corruption were expected to fall. When media and press serve the regime's personal interests, collaborating with it secretly as well as publicly, that media and press is corrupt.[70] Media is the component of civil society with the highest effect on public opinion because it shoulders the responsibility of promoting the principle of transparency through the circulation of information among the public.[71] Non-democratic governments often use equivocal regulations such as *offending a public official* or *spreading harmful information* as devices to avoid criticism of public officials and strategies, and indeed, the Egyptian government uses these provisions to arrest and detain critics, reporters, writers, and opposing politicians.[72] Such devices hinder social awareness and prevent convenient perceptions and information from broadcasting into the public. This is in direct conflict with nationals' right to interrogate, challenge, and hold their government accountable.[73]

Overall, the accepted customary international standards only permit boundaries on the content of speech in extremely narrow circumstances, such as cases of slander or libel against private persons or speech that undoubtedly threatens

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[68] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

[69] *See* SASSIN 'ASSAF & KEITH HENDERSON, COMPARATIVE REPORT ON THE STATE OF THE MEDIA IN EGYPT, JORDAN, LEBANON, AND MOROCCO 1-3 (2007), *available at* http://www.ifes.org/publication/afa896d49cfcb8fe19420c639c1481b0/Media%20Comparative%20Report%20FINAL.pdf.

[70] *See generally* Mathias A. Färdigh, Göteborg Univ., Press Freedom and Corruption: One of the Mass Media Functions in Promoting Quality of Government, Paper Presented at the Quality of Government Institute Working Conference in Nice (Oct. 23-26, 2007), *available at* http://mafardigh.files.wordpress.com/2010/10/press_freedom_and_corruption.pdf

[71] *Id.*

[72] *See Attacks on the Press 2006: Egypt*, COMMITTEE TO PROTECT JOURNALISTS (Feb. 5, 2007), http://www.cpj.org/2007/02/attacks-on-the-press-2006-egypt.php.

[73] *See Egypt's Mursi Bans Pre-trial Detention of Journalists*, BBC NEWS (Aug. 24, 2012), http://www.bbc.co.uk/news/world-middle-east-19367403 ("Egypt's President has passed a law banning the pre-trial detention of journalists, after coming under fire over the arrest of two critics."); *see also* Cornelis Hulsman, *Egypt Power Struggle Results in Detention of Journalists*, ARAB W. REP. (Aug. 24, 2012), http://www.arabwestreport.info/egypt-power-struggle-results-detention-journalists ("Court orders Egyptian newspaper editor to remain in custody, Mursi issues decree to cancel detention . . . President Mursi issued in response a decree, his first legislative act, to cancel the detention of defendants awaiting trial for media offenses.").

national security.[74] Hence, restrictions must be clearly defined, specific, necessary, and proportionate to the interest protected.[75] Article 19 of the ICCPR outlines the significant principles and values under which speech restrictions are permissible, namely that they be provided by virtue of law and necessary "(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order . . . or of public health or morals."[76] The Human Rights Committee's influential interpretation requires narrow interpretation of the constraints specified in Article 19(3) and requires that the restrictions "may not put in jeopardy the right itself."[77] In this sense, the government may enact and impose some restrictions only if prevailing legislation prescribes them and they meet the standard of being *necessary in a democratic society*.[78] Furthermore, "necessary" restraints must also satisfy a proportionality test.[79] Test criterion can be inferred from the Committee's wording that "restrictions must not be overbroad" and "the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain."[80] Accordingly, the legitimate government can implement restrictions on speech

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[74] *See* G.A. Res. 217 (III) A, *supra* note 68; *see also* Toby Mendel, Restricting Freedom of Expression: Standards and Principles 1 (Mar. 2010) (background paper for meetings hosted by the UN Special Rapporteur on Freedom of Opinion and Expression, Center for Law and Democracy), *available at* http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf

> It is universally acknowledged that the right to freedom of expression is a foundational human right of the greatest importance. It is a lynchpin of democracy, key to the protection of all human rights, and fundamental to human dignity in its own right. At the same time, it is also universally recognised that it is not an absolute right, and every democracy has developed some system of limitations on freedom of expression. International law does provide for a general three-part test for assessing restrictions on freedom of expression, and this test has been elaborated on in numerous judgments by international courts tasked with oversight of international human rights treaties.

Id.

[75] Mendel, *supra* note 74, at 9-20; *see also Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, ARTICLE 19, 5-10 (July 2000), http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf.

[76] *See* ICCPR, *supra* note 18, at art. 19. This test is also emphasized in Article 27(2) of the African Charter on Human and Peoples' Rights; *see* ACHPR, *supra* note 18, at art. 27(2).

[77] *See* U.N. Human Rights Comm., *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, at 5, U.N. Doc. CCPR/C/GC/34 (July 21, 2011).

[78] Mendel, *supra* note 74, at 9-20 (This indicates that the limitation must respond to a persistent public human need and be slanted towards the basic democratic values of diversity).

[79] *Id.* at 17-20; *see generally* Subhradipta Sarkar, *Right to Free Speech in a Censored Democracy*, 2009 DENV. U. SPORTS & ENT. L.J. 62 (2009).

[80] *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, *supra* note 77, at 8.

and the dissemination of information if the restrictions are based on considerations of proportionality and necessity.[81]

Article 102(bis) of the Egyptian Penal Code allows detainment of anyone "who deliberately diffuses news, information/data, or false or tendentious rumors, or propagates exciting publicity, if this is liable to disturb public security, spread horror among the people, or cause harm or damage to the public interest."[82] Article 80(d) provides a criminal punishment of six months to five years for "deliberately diffusing abroad news, information/data, or false rumors about the internal situation in the country in order to weaken financial confidence in the country or in its dignity, or [for taking] part in any activity with the goal of harming national interests of the country."[83] Likewise, Article 188 provides for a maximum of one year in jail for any individual who "makes public—with malicious intent—false news, statements or rumors that [are] likely to disturb public order."[84] In contrast, under Article 19(3) of the ICCPR, expressing false information is not an acceptable restraint on freedom of expression.[85] The Mubarak government relied on these Penal Code provisions on several occasions to arrest and sentence activists and political oppositionists for legal, peaceful expression.[86]

Furthermore, various articles of Egyptian Penal law offer extensive criminalization of political speech that does not directly provoke violence. These articles fail to conform to the stringent conditions for limits on speech stipulated by the ICCPR principles.[87] These inaccurate and elusive provisions

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[81] *Id.*; *see generally* S.B. CHIMHINI, S.F. SACCO & F.G. CHIWESHE, REGIONAL AND INTERNATIONAL STANDARDS ON THE FREEDOM OF EXPRESSION (2005).

[82] Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], at art. 102(bis) (Egypt).

[83] *See* Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 80(d) (Egypt).

[84] *Id.* art. 188; *see generally* KITUO CHA SHERIA NA HAKI ZA BINADAMU, FREEDOM OF EXPRESSION (2001) (on file with author).

[85] *See* ICCPR, *supra* note 18, at art. 19(3). At this point, the Human Rights Committee states that "[t]he Covenant does not permit general prohibition of expression of an erroneous opinion or an incorrect interpretation of past events." *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, *supra* note 77, at 12.

[86] *See*, *e.g.*, *Egypt: Government Detains Al-Jazeera Journalist*, HUM. RTS. WATCH (Jan. 17, 2007), http://www.hrw.org/news/2007/01/16/egypt-government-detains-al-jazeera-journalist; *Egypt: Prison for Al-Jazeera Journalist Who Exposed Torture*, HUM. RTS. WATCH (May 3, 2007), http://www.hrw.org/news/2007/05/02/egypt-prison-al-jazeera-journalist-who-exposed-torture. In the transitional period, SCAF stated that "the military did not summon all those who criticized the SCAF, but only those who 'make accusations against the SCAF' "; and asking them to present evidences to verify their claims. *See* THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 20.

[87] *Id.* at 20-21; *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, *supra* note 77.

outlaw calls to *end a social class* or the *basic systems of the social community*, and permit a government to govern subjectively whether or not the speech in question is legitimate.[88] For example, Article 176 allows for the imprisonment of anyone who "instigates discrimination against a sect because of gender, origin, language, religion, or belief, if such instigation is liable to disturb public order."[89] Additionally, Article 98 of Egypt's Penal Code provides criminal sentences for speech that go far beyond what is appropriate under international law, "forbidding political expression if it is critical of, or pursues to change, the current political, economic, and social order."[90] Public debate to change political, economic, and social systems is a part of political life; therefore individuals should be free to criticize and challenge their government and society through peaceful expression of views.[91]

With respect to the slander and defamation of public officials, Article 179 calls for the imprisonment of "whoever affronts the President of the Republic."[92] Practically speaking, these types of provisions protect governmental officials—as a part of political contribution—from public criticism by letting

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[88] *See generally Egypt President Issues Law to Free News Editor*, USA TODAY (Aug. 23, 2012, 5:30 PM), http://usatoday30.usatoday.com/news/world/story/2012-08-23/egypt-president-news-editor/57253920/1 ("Egypt's President intervened to release a newspaper editor jailed over accusations of insulting him . . . issuing a law for the first time since he assumed legislative powers . . . . President . . . Morsi's ban on detention for journalists accused of publishing-related offenses . . . . The court's decision, . . . accused [the editor] of slandering the President and undermining public interest, has caused uproar in Egypt among journalists and intellectuals . . . demanding the protection of free speech.").

[89] *See* Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 176 (Egypt); *see also* THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 21 ("Article 98B(bis) further extends these penalties to 'whoever obtains, personally or by an intermediary, or possesses written documents or printed matter comprising advocacy or propagation of anything of what is prescribed in articles 98B and 174, if they are prepared for distribution or for access by third parties, and whoever possesses any means of printing, recording or publicity which is appropriated, even temporarily, for printing, recording, or diffusing calls, songs, or publicity concerning a doctrine, association, corporation, or organization having in view any of the purposes prescribed in the said two articles.'"). In the same vein, "Article 174 provides for imprisonment of not less than five years for whoever 'incites to the overthrow of the system of government in Egypt.'" *Id.*

[90] Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 98 (Egypt); *see*, *e.g.*, *Egypt*: *Drop Charges Against Blogger*, HUM. RTS. WATCH (Jan. 27, 2007), http://www.hrw.org/news/2007/01/26/egypt-drop-charges-against-blogger.

[91] *See* Anugrah Kumar, *Egyptian President Urges Limits on Free Speech*, CHRISTIAN POST (Sept. 27, 2012, 5:32 PM), http://www.christianpost.com/news/egyptian-president-urges-limits-on-free-speech-82316/#IVecADu8Vu3yEejk.99 ("Egyptian President Mohamed Morsi . . . rejected President Barack Obama's call for freedom of expression, saying defamation of Islam will not be tolerated but while claiming he believes in democracy and human rights.").

[92] Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 179 (Egypt).

courts detain those who are believed to have "insulted" or "disrespected" them, or "attacked" their "dignity," "honor," or "reputation."[93]

Adopting these policies breaches the ultimate principle of international human rights law: that press and media freedoms should be broader as to speech about politicians, public officials, and other figures; taking into account the respectability and the non-intervention of their rights to reputation and privacy.[94] One should bear in mind that in a joint declaration adopted in 2002, the UN stated, "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[95] Moreover, the Johannesburg Principles on National Security, Freedom of Expression, and Access to Information (1995), which are based on international human rights law and other universal standards, provide that "[n]o one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency, or public official unless the criticism or insult was intended and likely to incite imminent violence."[96]

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[93] *See, e.g.*, Article 184 of the same Code states "whoever insults or libels the People's Assembly, the *Shoura* Council, any other state institution, the army, the courts or the authorities shall be punished with imprisonment and a fine of not less than 5000 Egyptian pounds." *Id.* art. 184 (Egypt). Moreover, Article 185 provides that "insulting a public official regarding his/her duty or service can be punished with a maximum of one year in prison." *Id.* art. 185. Further, Article 181 provides for imprisonment for "whoever insults a foreign king or head of state." *Id.* art. 181. Also, Article 182 provides a fine for "insulting the accredited representative of a foreign country in Egypt in relation to the performance of their duties." *Id.* art. 182. Additionally, Article 308 imposes a minimum jail penalty of six months on journalists or reporters whose articles attack "the dignity and honor of individuals, or an outrage of the reputation of families." *Id.* at 308.

[94] In this regard, the Human Rights Committee states that "because of the particularly high value of political speech the mere 'fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant.'" THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 24-25 (quoting *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, *supra* note 77, at 8 n.73 (citing U.N. Human Rights Comm., Bodrozic v. Serbia & Montenegro, Comm. No. 1180/2003, U.N. Doc A/61/4 (Vol. II), at 288 (Oct. 31, 2005))). Also, the committee mentions, "[S]tates parties should not prohibit criticism of institutions, such as the army or the administration." *Id.* at 10. Any criticism of a public employee for his or her job might be considered harm to his or her reputation, dignity, or honor. *Id.* at 9.

[95] *See* Ambeyi Ligabo et al., *International Mechanisms for Promoting Freedom of Expression*, ORG. AM. STS. (2002), http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&lID=1; *see*, *e.g.*, Karatas v. Turkey, 1999-IV Eur. Ct. H.R. 81.

[96] *The Johannesburg Principles on National Security, Freedom of Expression, and Access to Information*, *Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996) (*adopted on* Oct. 1 1995) (quoting Principle 7: Protected Expression). In this sense, Principle 1.3: Necessary in a Democratic Society reads:

In addition, the Mubarak administration harshly restricted freedom of association using a complex and mixed set of laws, decrees, and emergency powers to stifle the exercise of that right and the political dissent. This included restricting the right to form new political parties, trade unions, and non-governmental organizations ("NGOs") and associations.[97] Under international human rights law, membership in an unrecognized association alone cannot amount to a crime, because the only limitation is if the association openly calls for violence.[98] The wording of the Penal Code's provision is broad and includes language that proscribes reasonable non-violent political activity and organizing.[99] In this respect, the ICCPR primarily forbids worded bans on non-violent political doings and guarantees citizens the right to contribute in the conduct of public affairs—either directly or through freely elected representatives—and the right to vote and be elected in periodic free and fair elections.[100]

Egypt's current law violates and denies these rights based on race, religion, or gender, among other distinctions.[101] Based on international norms, the

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> To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:
> (a) the expression or information at issue poses a serious threat to a legitimate national security interest;
> (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.

Id.

[97] *See*, *e.g.*, Egyptian Penal Code, Article 98, added by Law No. 635 of 1954 (on file with author), provides for a maximum ten year sentence for anyone who "establishes an organization or association whose goal is to overthrow the political or social system of the country, or for the dominance of one social class over another or for an end to the economic system . . . or for the incitement to any of the aforementioned or the use of force or terrorism or any other illegitimate method in order to achieve this" and a sentence of five years for all those who "join one of these organizations mentioned in the previous paragraphs" and a sentence of one year to all those who "communicate directly or indirectly with such organizations." Article 98(a) bis, added by Law No. 34 of 1970 (on file with author), provides for a sentence of imprisonment and a fine of 100-1000 EGP for anyone who "creates or manages an organization or an association or a group whose goal is to call, using whatever means, for changing the basic principles of the Socialist System in the country or for the incitement to its hatred . . . or inciting resistance to public authorities." Article 98(a) bis, added by Law No. 34 of 1970 (on file with author). It further stipulates that a maximum five years of imprisonment shall apply to "anyone who joins one of these organizations in the knowledge of their stated aims or anyone who participates in any way [in their activities]." *Id.*

[98] *See generally* Lee Swepston, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, 137 INT'L LAB. REV. 169, 174-78 (1998), http://www.ilo.org/public/english/revue/download/pdf/swepston.pdf.

[99] Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 98 (Egypt).

[100] *See* ICCPR, *supra* note 18, at art. 25.

[101] Practically, the Mubarak regime used these articles to jail peaceful political opposition, arresting thousands of people, especially Muslim Brotherhood members and other Islamists,

Human Rights Committee stated, "[t]he right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25."[102] The Egyptian Law on Associations enables the government to interfere with the registration, governance, and operation of NGOs and impedes the right of Egyptians to form and operate independent associations.[103] This statute, through unacceptably inclusive clauses, gives the Minister of Social Solidarity power to disband groups and order the imprisonment of NGO members for otherwise legitimate actions, including: (1) receiving foreign resources or funds; (2) associating with foreign institutions without permission; (3) conducting political or trade union activities; and (4) violating "public order or morals."[104]

Under the umbrella of this law, "all non-profit groups of 10 members or more working in social development activities must register with the Ministry of Social Solidarity or face criminal penalties, including up to one year's imprisonment . . . ."[105] In theory, this contemporary law permits NGOs to work in several fields of activity; however, the scope of permissible NGO undertakings is still narrow and NGOs must pursue permission from the Solidarity Ministry before working in multiple fields.[106] The law prohibits groups from engaging in any objectives that will be considered as "threatening national

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claiming that they were a threat to public security because they used violence acts and were characterized as *extremists*. "Membership in a banned organization" is the highest criminal charge against Muslim Brotherhood members because it prevents individuals from exercising their right to freedom of association. *See*, *e.g.*, *Egypt: Release Journalist Who Criticized Torture*, HUM. RTS. WATCH (Apr. 19, 2007), http://www.hrw.org/news/2007/04/18/egypt-release-journalist-who-criticized-torture.

[102] *See* U.N. Human Rights Comm., General Comment 25 (57): General Comments Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, ¶ 26, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996).

[103] *See* Law No. 84 of 2002 (Law On Associations) *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], 5 June 2002 (Egypt).

[104] *Id.* art. 42; *see* NEGAD AL-BORA'I, AL-MAQSALA WA AL-TANUR: HURRAYYAT AL-TA'BIR FI MISR (2002-2003): AL-MUSHKILAT WA AL-HULUL [FREEDOM OF EXPRESSION IN EGYPT 2002/2003: PROBLEMS AND SOLUTIONS] 495-502 (2004) (on file with author).

[105] Law No. 84 of 2002 (Law On Associations) *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], 5 June 2002 (Egypt), at arts 11, 42, 76. (The quoted text can be found at THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 31-32). An assembly of less than ten individuals can neither apply for association status nor carry out volunteer performances. *See*, *e.g.*, Law No. 10 of 1914 (On Public Gatherings), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], June 4, 1923 (Egypt) (on file with author); Law No. 14 of 1923 (Determining the Rules Related to Public Meetings and Demonstrations on Public Roads), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], June 4, 1923 (Egypt) (on file with author); Law No. 34 of 2011 (Criminalizing Attacks on Freedom to Work and the Destruction of Facilities), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], Apr. 12, 2011, (Egypt) (on file with author).

[106] AL-BORA'I, *supra* note 104 (on file with author).

unity" or "violating public order or morals,"—unclear terms that allow for mistreatment.[107]

This law infringes upon the guarantees provided under international law for free association. According to international norms, the government may confine the right to freedom of association, but "only on certain narrowly prescribed grounds and only when particular circumstances apply."[108] Article 22 of the ICCPR stipulates:

> (1) Everyone shall have the right to freedom of association with others . . . .
> (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[109]

The government may inflict boundaries only if they are arranged by prevailing legislation and meet the standard of being "necessary in a democratic society."[110] "Necessary" restrictions must be based on proportionality criterion (emergency circumstances).[111]

Furthermore, public officials, people in power, and institutions should be required to accept a greater degree of criticism than ordinary residents.[112]

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[107] *Id.* (on file with author); Law No. 84 of 2002 (Law On Associations) *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], 5 June 2002 (Egypt), at art. 11; *see*, *e.g.*, *Egypt: End Harassment of Labor Rights Group*, HUM. RTS. WATCH (Apr. 27, 2007), http://www.hrw.org/news/2007/04/26/egypt-end-harassment-labor-rights-group; *Egypt: Obey Court*, *Recognize Labor Rights Group*, HUM. RTS. WATCH (June 6, 2008), http://www.hrw.org/news/2008/06/05/egypt-obey-court-recognize-labor-group; *Egypt: Reverse Decree Closing Human Rights Organization*, HUM. RTS. WATCH (Sept. 18, 2007), http://www.hrw.org/news/2007/09/17/egypt-reverse-decree-closing-human-rights-organization.

[108] *See* ICCPR, *supra* note 18, at art. 22; THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 33.

[109] ICCPR, *supra* note 18, at art. 22.

[110] This requires the restraint to respond to a pressing public need and be oriented along the global basic democratic values and ideals.

[111] *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 370-79, 394-96 (1993). In applying a limitation, a government should use no more preventive means than is completely necessary and may legally entail the formation to be notified of an association. On the other hand, if the government requires persons who wish to create an association to get permission before functioning, it must specify criteria that are obvious, unbiased, and appealable.

[112] Mendel, *supra* note 74, at 8. ("It is submitted that promotional measures should be deemed legitimate only where they meet a dual test of effectiveness and proportionality."); *see also* Toby Mendel, *Restrictions on Political Expression*, *in* POLITICAL DEBATE AND THE ROLE OF THE MEDIA: THE FRAGILITY OF FREE SPEECH 41, 42-43(2004).

Slander and defamation laws should defend the right to expression, contain the defense of truth, and only apply to expression that is subject to authentication and accuracy.[113]

The Egyptian House of Representatives should: (1) repeal all articles imposing criminal punishments for insulting or affronting public officials or institutions; (2) repeal defamation provisions; (3) repeal laws criminalizing freedom of religion; (4) provide that civil motions of insult that criticize public figures, including the presidency, parliament, and armed forces, in matters connected with their work, will not constitute defamation—and limit this right to individuals; (5) eradicate criminal sanctions for defamation in cases that do not implicate direct incitement of violent conduct; and (6) revise the Press and Media Laws to provide explicitly that journalists will not be imprisoned or otherwise criminally punished for exercising their rights to freedom of speech, as set out in relevant international law.[114] Also, it is imperative that Parliament specify that the authorities may confine the recording and registration of an

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[113] On the concept of defamation and slander, see Mendel, *supra* note 112, at 45-46; *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, *supra* note 75.

[114] "Article 98(f) of Egypt's Penal Code . . . criminalizes 'any use of religion to promote or advocate extremist ideologies . . . with a view toward stirring up sedition, disparaging or showing contempt for any divinely revealed religion, or prejudicing national unity and social harmony.'" Press Release, U.S. Comm'n on Int'l Religious Freedom, Egypt: Use of Blasphemy-Like Charges Must End (Apr. 5, 2013), *available at* http://www.uscirf.gov/news-room/whats-new-at-uscirf/3968-press-release-egypt-use-of-blasphemy-like-charges-must-end-april-5-2013.html. This article specifies punishments of up to five years in jail and a fine of up to 1000 EGP. Article 98(f), added by Law No. 34 of 1970 (on file with author). Regarding the right to freedom of thought, conscience, and religion, the Human Rights Committee states:

> Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

U.N. Office of the High Comm'r for Human Rights, *General Comment No. 22: The Right to Freedom of Thought, Conscience, and Religion*, ¶ 2, CCPR/C/21/Rev.1/Add.4 (July 30,1993). *See* Wahid Abdel Meguid, *Is Egypt Going Backward on Religious Freedom?*, AL-MONITOR (Nov. 16, 2012), http://www.al-monitor.com/pulse/politics/2012/11/egypt-religious-freedom-backward.html#ixzz2EuCS4cEZ ("The constitution protects the minority from injustice on the part of the majority—if this majority was unjust—and guarantees the rights of vulnerable social groups and those most in need of protection and care."); *see also* Kristen Chick, *'Insulting Religion': Blasphemy Sentence in Egypt Sends a Chill*, CHRISTIAN SCI. MONITOR (Dec. 12, 2012), http://www.csmonitor.com/World/Middle-East/2012/1212/Insulting-religion-Blasphemy-sentence-in-Egypt-sends-a-chill ("Blasphemy cases are on the rise in Egypt. Passage of the . . . constitution, with a clause prohibiting insulting prophets, could result in more decisions like today's sentence . . . . The prosecutor used this as evidence to charge him with insulting religion under a vague clause in Egypt's penal code that criminalizes the denigration of religion . . . .").

NGO only pursuant to the narrowly prescribed terms provided by international law; eliminate all punishments for directing legal NGO actions in unregistered NGOs; and confirm that any involuntary dissolution of an NGO takes place only by judicial order based on severe violation.[115]

4. Urgency to Amend the "Concept of Torture" within the International Humanitarian Law and Reinforce Criminal Punishments for Police Brutality

An effective departure from systematic police cruelties requires the government to launch instantaneous measures as part of a comprehensive policy to eliminate torture and guarantee a real transition from former offensive police and security force action.[116] Initially, the government should prioritize legal transformations to the existing Penal Code and the Code of Criminal Procedure.[117]

Under the Mubarak government, victims who accused police and law enforcement officials of torture were left without a remedy.[118] The vast majority of torture complaints never reached courthouses because of police coercion of victims and witnesses who filed complaints; the inept participation of police—as the alleged torturer—in gathering evidence, cross-examining, and summoning witnesses; and because of statutes that provide insufficient punishments and do not entirely criminalize mistreatment and inhumane acts by police.[119] The previous regime defended this legal framework as appropriate, saying that the "judicial application" of these criminal provisions, "in accor-

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[115] *See, e.g*., amending Article 42 to remove the administrative authority's power to dissolve an NGO. Also, amending Article 58 to permit receiving aid from foreign donors, as foreign exchange and customs laws are satisfied, maintaining any limitations and making transparent criterions. Simplify the administrative and bureaucratic procedures regarding the approval requests of foreign funding; allow NGOs to work in the geographical areas of their selection; ensure that the National Security division will have no role in monitoring NGO performances, or approving their registration; and abolish the requirement that NGOs seek various permissions from the Social Solidarity Ministry.

[116] 'Arafa, *supra* note 6, at 9-12.

[117] *Id.*

[118] WORK ON HIM UNTIL HE CONFESSES, *supra* note 38, at 1-5.

[119] *See, e.g*, impunity for torture was connected to *gihaz mabahes amn al-dawlah al-monhl* (Former State Security Investigations ("SSI")) officers; because no officer from that division was convicted of a torture act, however, there was verified documentation of systematic abuse. *Id. See* Hanly, *supra* note 42. *See also* John Glaser, *Egyptians Still Burdened with Police Brutality, Study Finds*, ANTIWAR.COM (Oct. 15, 2012), http://news.antiwar.com/2012/10/15/egyptians-still-burdened-with-police-brutality-study-finds/ ("Washington has continued to send Egypt money and weapons even after the fall of long-time puppet dictator Mubarak . . . . Police brutality in Egypt is as common under the newly elected President Mohammed Morsi as it was under the regime of Hosni Mubarak, a new study finds, raising questions about how much progress the revolution has made.").

dance with the jurisprudence of the Supreme Court," "punishes torture carried out by a member of a public authority or by an individual whether during the arrest, confinement or imprisonment of a person in the legally prescribed circumstances or otherwise."[120] Additionally, the National Council for Human Rights ("NCHR") found that this legal structure "is full of loopholes and also enables culprits [to] escape punishment."[121]

The criminal law has three focal provisions that prosecuting attorneys can use to charge police members in cases of purported torture and ill-treatment, such as articles that criminalize torture in general;[122] articles on the use of force;[123] and other provisions that specify a sentence of imprisonment "in all cases, [for] anyone who unlawfully arrests a person and threatens to kill him or subject him to physical torture."[124] Similarly, Egypt's Penal Code identifies torture as a criminal offense in one of the focal provisions, though the definition of torture is not in conformity with the international standards.[125] Article126 reads:

> Any public official/civil servant or public employee who orders torturing a suspect or does the torturing personally, in order to force him/her to confess, shall be punished with hard labor, or imprisonment for a period of three to ten years. If the tortured victim dies, the penalty as prescribed for deliberate murder shall be inflicted.[126]

Conversely, the concept cited in the above law does not meet the universal standard with respect to the concept of torture mentioned in the International Convention Against Torture[127] which stipulates in its first provision this meaning as follows:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a

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120 *See* HUMAN RIGHTS WATCH, EGYPT MASS ARRESTS AND TORTURE IN SINAI 41 (2005) (internal quotation marks omitted); Rep. of the Comm. Against Torture, 28th Sess., Apr. 29-May 1, 2002, U.N. Doc. CAT/C/SR.385 (May 14, 1999);

121 *See* NAT'L COUNCIL FOR HUMAN RIGHTS, ANNUAL REPORT 21 (2007/2008) (on file with author).

122 *Id.*; Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 126 (Egypt).

123 *Id.* art. 129.

124 *Id.* arts. 236, 241, 242, 280, & 282.

125 *Id.* art. 126.

126 *Id.*

127 *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

> confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[128]

Based on the aforesaid global concept, one may infer that Article 126 of the Egyptian Penal Code ignores circumstances when "pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," restraining it to the narrow situations of torture used to extract a confession under pressure.[129] The law simply limits torture to physical abuse, when the victim is "an accused," and when torture is used to force a confession, while confessions are commonly the object of torture.[130] Moreover, this definition inappropriately dismisses cases of mental or psychological abuse, and situations where the torture is committed against someone other than "an accused," such as interrogation of potential witnesses.[131] In this context, criminal law is unsuccessful in treating extremely specific categories of oppressions by law enforcement officials.[132] The law categorizes torture and "assault leading to death" as *jinayyat*

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[128] *Id.* art. 1.

[129] *Id.*; Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 126 (Egypt); *see also Egypt without Torture*, EGYPTIAN ORG. FOR HUMAN RIGHTS (June 27, 2012), http://www.en.eohr.org/2012/06/27/egypt-without-torture/.

[130] *See generally* 'Arafa, *supra* note 6, at 9-12. (Egyptian security forces also have used torture to penalize and/or threaten victims).

[131] *See generally* Almerindo E. Ojeda, *What is Psychological Torture*?, *in* THE TRAUMA OF PSYCHOLOGICAL TORTURE: DISASTER AND TRAUMA PSYCHOLOGY 1, 1-22 (Almerindo E. Ojeda ed., 2008) (examining the concept of psychological pain, the distinction between it and physical pain, and how much psychological pain should a practice induce in order to count as torture; and do individuals not vary as to the amount of pain they can tolerate; and how can we justify a universal threshold of torturous pain).

[132] In this domain, it should be noted that the tripartite classification of the criminal offenses adopted by the Egyptian Penal Code will be deducted from Article 9 of this code, which stipulates that: "Offenses are of three kinds: (1) *jinayyat* (Felonies) (2) *junah* (Misdemeanors), and (3) *mukhalafat* (Infractions/Violations)." Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 9 (Egypt). Also, Article 10 *as amended the Penal Law and the Law of the Criminal Procedure by* Act No. 95/2003 provides that: "A felony is an offense punishable by any of the following penalties: death, life imprisonment, aggravated detention, and simple detention." *Id*. art. 10. On the other hand, Article 11 of the same code stated: "A misdemeanor is an offence punishable by either of the following penalties: imprisonment, a fine the maximum of which exceeds five hundred Egyptian pounds." *Id*. art. 11. However, according to Article 12 "A contravention (infraction) is an offence punishable by a fine

(felonies), and other crimes, such as some forms of assault, arrest without legal and reasonable grounds, and the use of force by public officials, as *junah* (misdemeanors).[133]

Furthermore, the Egyptian Penal Code fails to provide for effective sentencing of law enforcement officers found guilty of torture and abuse.[134] Article 129 of the Egyptian Penal Code states that any public servant "who deliberately resorts, in the course of duty, to cruel treatment in order to humiliate or cause physical pain to another person shall be subject to a penalty of up to one year's imprisonment or a fine of up to EGP 200."[135] The criminal jurisprudence, particularly the *mahkamet al-naqed* ("Supreme Court: Court of Cassation") defined cruelty as "consisting of physiological and psychological ill-treatment in addition to physical ill-treatment" and stated "it did not necessarily lead to visible injuries."[136] Like other provisions governing assault, there is no distinction between offenders, as the penalty is identical whether the accused is a citizen or a public employee.[137] Only offenders "implementing terrorist aims" are singled out for considerably harsher punishment for assault, and may be punished by "aggravated detention or imprisonment" unless the assault was premeditated, in which case the punishment may be temporary or life imprisonment.[138] Several articles of Egypt's criminal legal system provide insufficient

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the maximum is which does not exceeds five hundred Egyptian pounds." *Id*. art. 12; *see* Belal, *supra* note 64.

133 *See generally* Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], arts. 129, 180 (Egypt).

134 *Id.* art. 129.

135 *See generally* Cliff Montgomery, *Egypt's Mubarak Spreads 'Torture Epidemic', Says Top Rights Group*, AM. SPARK (Feb. 5, 2011), http://www.americanspark.com/2011/02-05-11_mubarak-tortured-egyptians-for-years.html (quoting WORK ON HIM UNTIL HE CONFESSES, *supra* note 38) ("Security forces' routine use of torture initially targeted political dissidents, or those suspected of being dissidents, whether armed or peaceful. Torture subsequently became epidemic, affecting large numbers of ordinary citizens who found themselves in police custody as suspects, or in connection with criminal investigations. The practice of torture in Egypt, and the government's failure to hold perpetrators to account, occurs within the broader context of the state of emergency that has been in place since 1981, which has effectively created a culture of exceptionalism in which security forces operate outside the law.")

136 THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 42.

137 *See generally* Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 236 (Egypt) (This article criminalizes the act of assault leading to death under Egypt's Code and carries a maximum penalty of aggravated detention or imprisonment (three to seven years)).

138 *See* Law No. 100 of 1992 (integrated into the Penal Code by Law No. 97/1992), *Al-Jarida Al-Rasmiyya*, THE OFFICIAL GAZETTE (Egypt) (on file with author); *see* Shaun Waterman, *Emerging Threats Analysis*: *Egypt's New Anti-Terrorism Law*, UPI (Dec. 3, 2007, 12:05 PM), http://www.upi.com/Emerging_Threats/2007/12/03/Analysis-Egypts-new-anti-terrorism-law/UPI-86381196701541/ ("The Egyptian government is drafting a new anti-terrorism law that will replace the country's 26-year-old state of emergency. In the process it is going to have to redefine

sanctions for abuse during illegitimate custody and arrest.[139] For example, Article 63 of the Code states:

> No crime occurs where an act is carried out by a public official in execution of an order given by a superior which he is obliged to follow, or if he believed he was under an obligation to follow it or if he, in good faith, committed an act according to the law, to what he believed to be in his sphere of authority.[140]

In 1931, the Court of Cassation interpreted this provision in a landmark ruling, stating:

> [T]he acts of which the defendants stand accused would be manifestly illegal; and that the average man could not assume that this would be a legitimate command from their superiors because it crosses all bounds and harms human dignity. These provisions fall short of the requirements in the CAT which clearly states in Article 2(3) that an order from a superior officer or a public authority may not be invoked as a justification of torture.[141]

Under the Convention Against Torture, a state is "obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment . . . ."[142] The Committee against Torture, which is the body of international experts that reviews state compliance with the convention, has found that

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its relationship with the Muslim Brotherhood—which, though illegal, is still the most powerful opposition group.").

[139] Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE] (Egypt).

[140] THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 42. Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], art. 63 (Egypt). Also, the criminal code does not state that "superior orders are defense", and Egyptian courts have acknowledged that torture is a prominently illegal act.

[141] THE ROAD AHEAD: A HUMAN RIGHTS AGENDA, *supra* note 20, at 43 (footnote omitted) (internal quotation marks omitted); *see*, *e.g.*, U.N. Human Rights Council, Nat'l Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Egypt, 7th Sess., Feb. 8-19, 2009, U.N. Doc. A/HRC/WG.6/7/EGY/1 (Nov. 16 2009); *see also* Mohamed Abd al-Kader, *Shaab Legislative Committee Refuses to Increase the Penalty for Torture. . .Altercation Between MPs*, AL-MASRY AL-YOUM (Feb. 16, 2010), http://www.almasry-alyoum.com/article2.aspx?ArticleID=244193&IssueID=1683.

[142] *See* U.N. Comm. Against Torture, *General Comment 2*, *Implementation of Article2 by States Parties*, 39th Sess., Nov. 5-23, 2007, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (Nov. 23, 2007).

"[i]nadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice."[143]

The Egyptian Assembly should amend the criminal law definition of torture to correspond with the universal concept of torture. The Assembly should expand the definition of torture to comprise penalty as a purpose and psychological torture as a means of inflicting pain and should alter provisions proscribing torture, abuse by officials, and illegal custody. The Assembly should reclassify these offenses as felonies rather than misdemeanors, to make the punishments coincide with the gravity of the offenses. The Egyptian Assembly should also modify the Code of Criminal Procedure to permit victims of police brutality to file private criminal lawsuits against those accountable. Finally, the Assembly should amend the Police Law to enable the Ministry of Interior to instantaneously suspend any security official under investigation for ordering, carrying out, or complying with acts of torture and to guarantee their dismissal if convicted.[144]

The drafting process of Egypt's 2012 constitution was suspended because it was so confrontational that a number of Constituent Assembly members resigned in demonstration over what they claimed was the domination of Islamists and the failure to compromise on key issues pertaining to human rights and public freedoms.[145] The abrogated constitution, approved in the midst of a political stalemate between the exiled President Mohammad Morsi and the judiciary, provides some economic rights and basic protections against arbitrary detention and torture, but fails to end military trials of civilians and fails to defend freedom of expression and religion.[146] Section III of this Article

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[143] *See* U.N. Rep. of the Comm. Against Torture, *Activities of the Committee Against Torture Pursuant to Article 20 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment: Turkey*, Nov. 15, 1993, U.N. GAOR, 48th Sess., Supp. No. 44, A/48/44/Add.1, at ¶ 39, (Nov. 15, 1993).

[144] *See* Cynthia Schneider & Khaled Abol Naga, *Egypt's Military Must Stop Torturing Detainees*, CNN (May 22, 2012, 12:57 PM), http://www.cnn.com/2012/05/22/opinion/schneider-naga-egypt/index.html; *see also* Yolande Knell, *Egypt's Police Still in Crisis after Revolution*, BBC NEWS (Mar. 4, 2012), http://www.bbc.co.uk/news/world-middle-east-17128116 ("It was no coincidence that Egypt's uprising began on Police Day last year; protesters' original demands included the resignation of the hated former interior minister, Habib al-Adly, and an end to the abuses committed by his security forces."); *see*, *e.g.*, Aziz El-Kaissouni, *Egypt Police Beat*, *Detain Blogger: Rights Group*, REUTERS (Feb. 9, 2009, 4:33 PM), http://www.reuters.com/article/2009/02/09/us-egypt-blogger-idUSTRE51853020090209; *see also* Lara Logan, *The Deadly Beating that Sparked Egypt Revolution*, CBS NEWS (Feb. 3, 2011, 8:31 AM), http://www.cbsnews.com/2100-18563_162-7311469.html.

[145] *See Egypt: New Constitution Mixed on Support of Rights*, HUM. RTS. WATCH (Nov. 30, 2012), http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights.

[146] *Id.*; *see generally* Eric Trager, *Shame on Anyone Who Ever Thought Mohammad Morsi Was a Moderate*, NEW REPUBLIC (Nov. 26, 2012), http://www.newrepublic.com/blog/plank/110447/why-did-anyone-ever-believe-mohammad-morsi-was-moderate ("[G]iven the Brotherhood's

will provide a brief analysis of the problematic provisions in the amended Egyptian Charter of 2012 and offer fundamental proposals to the new constitutional Committee, which interim President Mansour appointed to facilitate constitutional amendments after the ouster of Morsi by a massive rebellion on June 30, 2013.

III. The Failure of the *De Facto* 2012 Egyptian Constitution to Guarantee Basic Human Rights and the Vision of a Religious not a Civil State under Islamism and Exiled President Morsi

For some Islamists, the constitution is the foundation of their motivation to bring Islamic rule, an objective they claim is justified by their victory over the past eighty years in opening the door for a religious state under the cover of Islam as a religion. Islamists tend to play with religion and integrate it with politics with little knowledge about the real Islam and Islamic law.[147] One of the most debatable provisions in this constitution, with respect to the state's identity and religion, is Article 2, which stipulates that "Islam is the religion of the state and . . . . [p]rinciples of Islamic [*Sharie'a*] are the principal source of legislation."[148] This is the equivalent of both the *de facto* constitution of 1971

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belief that it can mobilize legions of foot soldiers to win any street battle domestically, only international pressure might force it to think twice" about its undemocratic approach. "Nobody should have been surprised when Egyptian President Mohamed Morsi issued a 'constitutional declaration' . . . asserting total political power. This was . . . complementing his earlier seizure of legislative and constitution-writing authorities by now insulating himself from judicial oversight.").

147 *See In Articles Explicit and Vague*, *Egypt Draft Constitution Allows Widespread Use of Islamic Law*, FOXNews.com (Dec. 7, 2012), http://www.foxnews.com/world/2012/12/07/in-articles-explicit-and-vague-egypt-draft-constitution-allows-widespread-use/#ixzz2FMOG7Tpx ("One of Egypt's most prominent ultraconservative Muslim clerics had high praise for the country's draft constitution . . . ensuring that laws and rights would be strictly subordinated to Islamic law. 'This constitution has more complete restraints on rights than ever existed before in any Egyptian constitution. . . . This will not be a democracy that can allow what God forbids or forbid what God allows.'").

148 *See* Constitution of the Arab Republic of Egypt, Dec. 27, 2012, at art. 2, http://www.sis.gov.eg/newvr/theconistitution.pdf. *See also* Nariman Youssef, *Egypt's Draft Constitution Translated*, Egypt Indep. (Dec. 2, 2012), http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated (providing English translation of the new constitution); *see* Nathan J. Brown, *Egypt*'s *Constitution Conundrum: The Good*, *the Bad*, *and the Unruly in Cairo*, Foreign Aff. (Dec. 9, 2012), http://www.foreignaffairs.com/articles/138495/nathan-j-brown/egypts-constitution-conundrum ("Democracy has failed in the Arab world not because governments have routinely violated their countries' highest laws (although they have occasionally cheated) but, rather, because their constitutions' democratic promises have generally been as vague as possible and were left to parliaments to flesh out through regular statutes.").

and the rebelled (omitted) interim constitutional declaration of 2011.[149] In this respect, international canons do not proscribe an official state religion, yet numerous countries around the world have one.[150]

Nevertheless, an official religion cannot be the basis for depriving individuals of their rights simply because they do not follow that religion. Nor should an official religion discriminate against individuals or their spiritual beliefs.[151] A new and perilous provision was added to Article 219 within the general and transitional rules of the amended constitutional document. The provision pertains to the meaning and concept of the "Islamic *Sharie'a* principles"; stating, "[t]he principles of Islamic [*Sharie'a* by definition] include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community."[152] This raises an inquiry of the

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[149] *See*, *e.g.*, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, *as amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, at art. 2.

[150] *See* Khaled Diab, *Egypt's Draft Constitution Leans Towards Conservative Islam*, THE GUARDIAN (Oct. 23, 2012), http://www.theguardian.com/commentisfree/2012/oct/23/egypt-draft-constitution.

> Despite its democratic aspirations, this paternalistic document contains worrying signs for women and non-Muslims . . . . Article 68 (one of the most hotly debated) begins promisingly by informing us that 'the state will do everything to promote equality between women and men,' before delivering the sting in its tail, 'without abandoning the judgments of Islamic law'. . . . The inherent contradictions in Egypt's . . . constitution . . . will leave it wide open to individual interpretation and so Egypt's future as a progressive, enlightened and tolerant state rests in the ability of liberal, secular, pluralistic forces to seize the upper hand from the Islamists.

Id. See also Egypt: *International Religious Freedom Report 2007*, U.S. DEP'T ST., http://www.state.gov/j/drl/rls/irf/2007/90209.htm (last visited Dec. 10, 2013) ("The Constitution provides for freedom of belief and the practice of religious rites, although the Government places restrictions on these rights in practice. Islam is the official state religion and [*Shari'a*] (Islamic law) is the primary source of legislation; religious practices that conflict with the Government's interpretation of [*Shari'a*] are prohibited. Members of non-Muslim religious minorities officially recognized by the Government generally worship without harassment and maintain links with coreligionists in other countries; however, members of religious groups that are not recognized by the Government, particularly the [*Baha'i*] Faith, experience personal and collective hardship. Religious freedom is an important part of the bilateral dialogue. The right of religious freedom has been raised with senior government officials by all levels of the U.S. Government, including by visiting members of Congress, the Secretary of State, Assistant Secretary for Near Eastern Affairs, the Ambassador, and other State Department and embassy officials. The Embassy maintains formal contacts with the Office of Human Rights at the Ministry of Foreign Affairs.").

[151] *See id.*; *see* sources cited *supra* note 114.

[152] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 219, http://www.sis.gov.eg/newvr/theconistitution.pdf; *see* sources cited *supra* notes 114 and 148; *see also* Osman El Shamoubi, *New Egyptian Constitution Offers Fewer Religious Freedoms, Critics Allege*, AHRAM ONLINE (Oct. 2, 2012), http://english.ahram.org.eg/News/54582.aspx ("Article 8 of Egypt's draft constitution may take away religious freedoms stipulated in previous constitutions . . . . Article 8 of the draft constitution is at the heart of the debate, as it stipulates citizens'

standing of other Islamic doctrines and scholarship in the Egyptian legal system, giving Islamists a tool to limit freedoms. It also favors the linguistic interpretation of the conservative jurisprudential *Sunni* schools over all other doctrinal thoughts.[153] The equivocal term "principles" previously gave policymakers and legislators such broad flexibility that they could almost apply the prevailing positive laws—which are based on the European and Napoleonic civil law system—without any contradiction or paradox to the "main principles" or the "bulk" of Islamic law.[154]

On the other hand, *Salafis* (extreme or radical Islamists) insisted on adding Article 219, defining the principles of *Sharie'a* for the first time in Egypt's constitutional history. It states that "the principles"[155] should be based on general evidence, central rules of Islamic jurisprudence, and "credible sources accepted in Sunni doctrines . . . ."[156] The language is ambiguous, drawn from

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religious freedoms. Religious rights and freedoms, and the issue of sectarian tensions between members of Egypt's majority Muslim population and its Christian minority, remain controversial. One of the many problems that Egypt's Christian minority complains of are the difficulties of building and repairing churches, as both acts are subject to state control. A law was drafted in 2011 to address the problem but is yet to be put into effect.").

153 For a full account of information regarding the interpretation of this article, *see generally* Mohamed 'Arafa, *President Mursi's Egypt Arab Spring: Does Egypt Will Continue to be a Civil State or Under the Umbrella of Islamic* (*Sharie'a*) *Law and Islamism?*, 9 U.S.-CHINA L. REV. 528 (2012).

154 *Id.* at 528-29. (Consequently, Islamic law largely only governed rules on family law and inheritance issues).

155 *Id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 219, http://www.sis.gov.eg/newvr/theconistitution.pdf; *see also* David D. Kirkpatrick, *A Vague Role for Religion in Egyptian Draft Constitution*, N.Y. TIMES at A4, (Nov. 10, 2012), *available at* http://www.nytimes.com/2012/11/10/world/middleeast/draft-egyptian-constitution-adopts-a-role-for-religion.html?_r=0 ("Egypt has settled on a compromise that opens the door to more religion in governance but mainly guarantees that the issue will continue to roil politics, the Parliament and the courts for many years to come. The compromise would insert religion more deeply into the legislative and judicial process by elaborating new guidelines to interpret 'the principles of Islamic law' ").

156 CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 219, http://www.sis.gov.eg/newvr/theconistitution.pdf; *see* Ahmed Aboul Enein, *Analysis of Constitutional Draft—Part 2*, DAILY NEWS EGYPT (Oct. 17, 2012), http://www.dailynewsegypt.com/2012/10/17/analysis-of-constitutional-draft/ ("Rights and freedoms have been at the forefront of the constitutional debate gripping Egypt, with several leaks from inside the Constituent Assembly introducing articles which drew the scorn of several rights groups and political parties. The article on human dignity, the rights section's first article, is a double-edged sword. Although it states human dignity is a right and that the state and society have to respect it, it also stipulates, 'under no circumstance may a citizen be insulted or disrespected' which can be interpreted to allow for legislation which limits freedom of speech or even lead to imprisonment, in the ilk of contempt of religion laws.").

the expressions of the religious scholars and largely perplexing.[157] Article 219 requires that laws passed by the People's Assembly must follow, and are subject to, specific understandings of *Sharie'a*, on which the four main Islamic schools of *Sunni* thought in the Islamic *fiqh* (jurisprudence) agree. These understandings may lead to, for example, proscription of interest on loans (*ribba*),[158] gender segregation, requiring women to wear *hijab* (headscarves), permitting girls to marry when they reach puberty, and ruling out any reformist prospects.[159]

Furthermore, Article 3 is a new article added to the constitutional document—subject to amendment by the new legal and social committee—as a sort of new guarantee to the minorities in Egypt and as a mechanism to avoid the sectarian strife tensions and protect the State's identity. It stipulates, "[t]he canon principles of Egyptian Christians and Jews are the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders."[160] The provision fails to recognize the personal status non-religious persons and members of other religious assemblies by restraining personal status (family) law to Christian and Jewish principles.[161] Article 43 in

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[157] ("It is like a bombshell . . . the doors are wide open to restrict individuals' freedoms"), *quoted by* Professor Dr. Mohammed Hassanein Abdel-Al, constitutional law professor at Cairo's 'Ain Shams University Law School (on file with author).

[158] *Ribba* means interest. *Ribba* (interest) is prohibited in Islamic economic jurisprudence and considered a major sin. Simply, unjust gains in commerce or business, generally through exploitation. There are two sorts of *ribba* discussed by Islamic scholars: an upsurge in capital without any services provided and speculation (*maisir*), and commodity exchanges in unequal quantities, which both are prohibited by the *Qur'anic* texts and the *Sunnah* (the Prophet Mohammad's teachings). For further details on *ribba* under the umbrella of Islamic jurisprudence, *see* RAJ BHALA, UNDERSTANDING ISLAMIC LAW 667-700 (2011).

[159] 'Arafa, *supra* note 153, at 542-45; *see also* Nancy Messieh, *Continued Contradictions in Egypt's Draft Constitution: A Preliminary Reading*, ATLANTIC COUNCIL (Nov. 29, 2012), http://www.atlanticcouncil.org/blogs/egyptsource/continued-contradictions-in-egypts-draft-constitution-a-preliminary-reading ("Not only do these two articles contradict each other, but as pointed out . . . this is Egypt's first constitution to adopt a specific religious doctrine for the state . . . ."). It should be noted that Islamic law refers to "an all-encompassing system combining religion, ethics, inter-personal values, standards of behavior, and law." Mohamed 'Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals Being in Practice?*, 18 GOLDEN GATE ANN. SURV. INT'L. & COMP. L. 171, 182, 184-86 (2012) (citing Mohamed al-Zorkani, Sharh Al-Muwat'a'a [Explanation of Muwat'a: The Smooth Path] 23, 30 (1978)). The term "Islamic law used to refer to the entire system of jurisprudence associated with Islam. On the other hand, Islamic law (*Sharie'a*) is different from Islamic *Fiqh* (Jurisprudence). *Fiqh* refers to the understanding of Islamic rules and principles. On this point, see in detail, 'Arafa, *supra*. On the distinction between *Sharie'a* and *Fiqh*, see Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 29, 36-37, 56 (2002).

[160] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 3, http://www.sis.gov.eg/newvr/theconistitution.pdf. 'Arafa, *supra* note 153, at 540-42.

[161] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 3, http://www.sis.gov.eg/newvr/theconistitution.pdf. In this regard, most of the Middle Eastern countries do not

the 2012 Islamist Constitution on freedom of religion limits the right to practice religion and establish places of worship to Muslims, Christians, and Jews.[162] In the same regard, Article 60 reads, "[R]eligious education and national history are core subjects of pre-university education in all its forms."[163] To con-

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recognize the non-religious individuals (atheists or agnostics) or other religious persons. They recognize only the three divine Abrahamic religions, which are Judaism, Christianity, and Islam and they prevent others from enjoying their basic freedoms. Katrina Lantos Swett & Mary Ann Glendon, *Egypt Breaks Faith on Religious Freedom*, AL-MONITOR (June 9, 2013), http://www.al-monitor.com/pulse/originals/2013/06/egypt-religious-freedom-morsi-anniversary.html. "Previous drafts had provided for a general right to practice religion but limited the establishment of places of worship to adherents of these three Abrahamic religions." *Egypt: New Constitution Mixed on Support of Rights*, *supra* note 145. "These people are referred to as 'people of the book'" (*ahl al-zihmma*h/*ah-alkitab*). One of the arguments raised by legal scholars is that if the door opens for non-religious individuals to practice their beliefs, they will contradict the permissible practice for the religious spirituals of the "divine" religions, as the notion will be in conflict with the idea of "public order," which relates the protection of public interests and general welfare of the State—a constitutional guarantee confirmed by the constitutional jurisprudence in several decisions; *see generally* Saba Mahmood & Peter Danchin, *Religious Freedom in the Jurisprudence of the Egyptian and European Court of Human Rights*, 13 S. ATLANTIC Q. (forthcoming 2014).

[162] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at arts. 2, 3, 43, http://www.sis.gov.eg/newvr/theconistitution.pdf. Some scholars state "Article 43 discriminates against and excludes followers of other religions, including Egyptian Bahais." *See Egypt: New Constitution Mixed on Support of Rights*, *supra* note 145. "Under former exiled President Hosni Mubarak, security forces would frequently arrest religious minorities including Shia, Ahmadis, Bahais, and Quranists" because of their religious thoughts and spiritual beliefs." *Id.* According to this Article, "Freedom of belief is an inviolable right. The State shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions, as regulated by law." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 43, http://www.sis.gov.eg/newvr/theconistitution.pdf. Article 43 has various debatable issues. Protections are limited to "rights" and founding worship places; international norms protect much wider types of activities and expression. Katrina Lantos Swett, *Egypt's New Constitution: Challenges for Religious Freedom and Related Rights*, GEO. J. INT'L AFF. (Mar. 21, 2013), http://journal.georgetown.edu/2013/03/21/egypts-new-constitution-challenges-for-religious-freedom-and-related-rights-by-katrina-lantos-swett/. Moreover, this limited conception of religious expression is limited to followers of the "divine" religions. *Id.* Also, there is no mention of the right to change one's religion, or of the parents' right to raise their children consistent with their own religion or belief. *Id*. It should be noted that *riddah* (apostasy) is a debatable matter among Muslim scholars and jurists under Islamic law with respect to its various punishments imposed.

[163] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 43, http://www.sis.gov.eg/newvr/theconistitution.pdf, at art. 60. *See Egypt's Constitution: An Endless Debate over Religion's Role*, THE ECONOMIST (Oct. 6, 2012), *available at* http://www.economist.com/node/21564249.

> In Egypt and elsewhere the drafters of constitutions wrangle and tangle. . . . The Islamist-dominated panel charged with devising Egypt's new constitution recently watched a puzzling spectacle, as dissident Christians pleaded for wording that would fully subject not only the Muslim majority but also non-Muslim minorities to Islamic law. To those who equate *sharia* with the chopping of hands and heads this must seem a peculiar demand. But accommodating religious rules is a tricky matter.

form to international ideals, this provision requires a non-discriminatory manner of application.[164]

Another new article in that Charter—also subject to amendment—states that members of the clergy from *Al-Azhar*, Egypt's most prominent Islamic institution, are "to be consulted on any matters related to *Sharie'a*," tacitly giving them oversight in legislation and giving their religious scholars a role in reviewing laws and regulations. This will also open the door for this Islamic and credible association to become more corrupt.[165] In practice, this noteworthy religious agency has proven to be efficient in undertaking its role; however, irrespective of the effectiveness of this foundation, it will suffer from weaknesses in terms of its freedom of incomplete political independence. One of the main defects of the governmental establishments is its subordination to the executive branch.[166] Thus, Article 4 was problematic on various levels because it creates a new role for non-governmental institutions—like *al-azhar*, the prestigious religious school of Islamic scholarship—by requiring them to review legislation without approving it and without an official output, resulting in vagueness.[167] Hence, the House of Representatives can decide in various ways, because parliament's members may submit controversial laws with religious content to get the House's "advisory opinion" or "consultancy," which will likely be "non-binding"; however, Islamists can still use that "non-binding"

Id.

[164] *See* sources cited *supra* note 114.

[165] Youssef, *Egypt's Draft Constitution Translated*, *supra* note 148 (Article 4 states: "Al-Azhar is an encompassing independent Islamic institution, with exclusive autonomy over its own affairs, responsible for preaching Islam, theology, and the Arabic language in Egypt and the world. Al-Azhar Senior Scholars are to be consulted in [m]atters pertaining to Islamic law. The post of Al-Azhar Grand Sheikh [leader] is independent and cannot be dismissed. The method of appointing the Grand Sheikh from among members of the Senior Scholars is to be determined by law. The State shall ensure sufficient funds for Al-Azhar to achieve its objectives. All of the above is subject to law regulations.").

[166] 'Arafa, *supra* note 153, at 533-37; *see generally* Richard Rousseau, *Potential Consequences of Egypt's Constitutional Referendum*: *Analysis*, EURASIA REV. (Dec. 20, 2012), http://www.eurasiareview.com/20122012-potential-consequences-of-egypts-constitutional-referendum-analysis/ ("Section 2 states that the principles of Islamic law, the Sharia, form the basis for legislation. Some provisions of Mubarak's constitution of 1971 have also been incorporated in the new draft constitution, but a clause was added which specifies that the interpretation of the law is the responsibility of the Islamic scholars at Al-Azhar University in Cairo rather than the courts.").

[167] 'Arafa, *supra* note 153, at 533-37; *see also* Gregg Carlstrom, *Political Clash over Egypt's Constitution*, AL JAZEERA (Oct. 20, 2012), http://www.aljazeera.com/indepth/features/2012/10/20121019620186523.html ("Liberals and salafists spar over cultural issues, while the draft says little about reforming Egypt's political system. . . . The debate has instead focused on cultural issues—on 'how much sharia we should have,' as one source on the committee described it, referring to Islamic law.")

result to build support for religious legislations or given laws.[168] Even though its opinion will be "non-binding," the House can push Parliament in a more religious direction. The Islamists' prefer to use numerous religious views and conservative interpretations that do not unequivocally create a religious state, but open the door for one based on the political dynamics, the nature of Parliament, and the balance between Islamists and non-Islamists.[169]

Accordingly, it is highly recommended that the new Constitutional Committee appointed to amend the constitutional charter protect *al-azhar*'*s* scholars and senior jurists from political interference by enhancing its independence and ensuring that no political intervention takes place in its decisions, as has occurred in the past.[170] Furthermore, the neutrality these agencies maintain adds to their credibility and impartiality.[171]

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[168] Arafa*, supra* note 153, at 533-37. The author—at this point—assumes it is very hard to say "No" for the most respectable and moderate Islamic foundations in the Middle East with respect to the Islamic faith and Islamic law issue interpretations.

[169] *Id.* In the same vein, both Articles 2 and 219 are already open to that, so it is meaningless to add Article 4, including the role of *al-azhar*, which is very risky. This may open the door implicitly for other religious bodies to play a role in the State, which can pave the way for an Islamic State and the use of *welaiat al-faqih* notion ("Religious-Jurist Domination"); *see* Lee Keath & Maggie Michael, *Draft Egyptian Constitution Turns to Sharia Law*, NEWSDAY (Dec. 8, 2012, 7:04 PM), http://www.newsday.com/news/world/draft-egyptian-constitution-turns-to-sharia-law-1.4309174 (internal quotation marks omitted) ("'This constitution has more complete restraints on rights than ever existed before in any Egyptian constitution. . . . This will not be a democracy that can allow what God forbids, or forbid what God allows.' . . . The . . . constitution . . . would empower Islamists to carry out the most widespread and strictest implementation of Islamic law that modern Egypt has seen. That authority rests on the three articles that explicitly mention Shariah, as well as obscure legal language buried in a number of other articles that few noticed during the charter's drafting but that Islamists insisted on including. . . . For Islamists, the constitution is the keystone for their ambitions to bring Islamic rule.").

[170] Arafa*, supra* note 153, at 533-37; *see also* Clark Lombardi & Nathan J. Brown, *Islam in Egypt*'*s New Constitution*, MIDDLE E. CHANNEL (Dec. 13, 2012), http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution. ("'The principles of the Islamic Sharia include its '*adilla al-kulliya*, *qawa*'*id usuli* and *qawa*'*id fiqhiyya* and the sources considered by the Sunni *madhhabs*.' . . . Scholars associated with the four Sunni schools wrote texts in a variety of genres. One set of texts explored questions of how to derive law from scripture (*usul al-fiqh*). Another elaborated *what* answers particular scholars had reached about God's law (*fiqh*). A . . . set of texts described underlying *principles* beneath the rulings that Sunni scholars had reached when resolving questions of Islamic law. Derived through a process of inductive reasoning, these principles (the so-called *qawa*'*id fiqhiyya*) were thought to be generally applicable principles of law. . . . Choice of one methodology over another does not inevitably lead to particular substantive outcomes. Scholars using traditional methods of legal interpretation often disagree with each other on important questions of Islamic law.").

[171] Lombardi & Brown, *supra* note 170 (The Supreme Constitutional Court ("SCC") "itself is likely to continue to be called upon to play a major role. The constitution allows the more senior justices on the SCC to retain their positions, and these are precisely the figures who helped apply the SCC's old approach. They may not feel compelled to bend despite the provision's fairly precise language. But as they are replaced—and as a new law is written to govern appointment to

On the other hand, concerning the freedom of thought and opinion, Article 45 of the 2012 Constitution provides that: "Freedom of thought and opinion shall be guaranteed. Every individual has the right to express an opinion and to disseminate it verbally, in writing or illustration, or by any other means of publication and expression."[172] Yet, the legal linguistic interpretation in both Articles 44 and 31 seems to bind this provision.[173] Therefore, these articles are not appropriate boundaries on freedom of expression under international human rights law and other recognized universal ideals. They make problematic—if not impossible—any evocative reform to prevailing Penal Code provisions that criminalize "slander" and "defamation" provisions regularly used under the former regime to indict or prosecute critics of the government and public figures in power.[174] In this respect, Article 31 requires revision because it forbids insulting and defaming any person—a provision that breaches the right to freedom of expression and makes defamation a criminal offense.[175] The above-mentioned provisions impede Article 45, which assures freedom of expression and opinion, and violate Egypt's international obligation to endorse freedom of expression under Article 19 of the ICCPR.[176]

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the SCC—the court's stance might change to one friendlier to neo-traditional understandings" such as Sunna (the sayings and deeds of the prophet), qiyas (reasoning by analogy), and Ijma (the consensus of scholars) . . . and interpreted in a manner informed by a study of texts considered exemplary within the Sunni tradition."). 'Arafa, *supra* note 153, at 531-32.

[172] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 44, http://www.sis.gov.eg/newvr/theconistitution.pdf.

[173] In this regard, Article 44 reads, "Insult or abuse of all religious messengers and prophets shall be prohibited." *Id.* art. 44. Egyptians, by their nature, are not familiar with insulting, offending, or abusing any religions or any messengers, prophets, or other religious symbols of any religion or belief. Thus, it is meaningless, kind of suspicious, and just contradictory to stipulate such a provision in the constitution. It may indirectly lead to future suppression and oppression if Islamists dominate the entire political and legal scene. Article 31 states "Dignity is the right of every human being, safeguarded by the State. Insulting or showing contempt toward any human being shall be prohibited." *Id.* art. 31.

[174] Law No. 58 of 1937 (Egyptian Penal Code, reformed in 1952), *Al-Jarida Al-Rasmiyya* [THE OFFICIAL GAZETTE], arts. 60, 80, & 98 (Egypt).

[175] *See*, *e.g.*, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 31, http://www.sis.gov.eg/newvr/theconistitution.pdf.

[176] *See* ICCPR, *supra* note 18, at art. 19; *see* Ragab Saad, *Egypt's Draft Constitution Opens Door to Religious State*, MIDDLE E. VOICES (Oct. 23, 2012), http://middleeastvoices.voanews.com/2012/10/insight-egypts-draft-constitution-opens-door-to-religious-state-13448/ ("[T]his constitution . . . [is] the first Egyptian Constitution that adopts a specific religious doctrine for the state. It also means that ancient texts on Islamic jurisprudence, and others that may not even exist anymore, will become sources of Egyptian legislation from which a parliamentary majority may select what it wants from its provisions, instituting authoritarianism in the name of religion. This scenario is the driving force behind the insistence that the constitution provide for a democratic regime in Egypt based on the principles of '*Shura*' (or consultation). It is an ambiguous concept that has no specific legal characterization, but it refers to a legacy of jurisprudence that ensures that '*Shura*' does not belong to the ruler alone. This is the essence of democracy.").

Some provisions—recommended for revision—intend to create restrictions not allowed under international human rights principles and in conflict with other provisions, just to give extensive power to apply *Sharie'a* without directly citing or mentioning it. Islamists often introduce these provisions through delicate additions and incomprehensible language, which raise suspicions about indirect intentions.[177] For instance, Article 81 reads:

> Rights and freedoms pertaining to the individual citizen shall not be subject to disruption or detraction. No law that regulates the practice of the rights and freedoms shall include what would constrain their essence. Such rights and freedoms shall be practiced in a manner not conflicting with the principles pertaining to State and Society Part included in this Constitution.[178]

This article seems to conflict with Articles 10, 11, and 12, which read:

> The family is the basis of society and is founded on religion, morality, and patriotism. The State is keen to preserve the genuine character of the Egyptian family, its cohesion and stability, and to protect its moral values, all as regulated by law. The State shall ensure maternal and child health services free of charge, and enable the reconciliation between the duties of a woman toward her family and her public work. The State shall provide special care and protection to female breadwinners, divorced women, and widows. . . . The State shall safeguard ethics, public morality and public order, and foster a high level of education and of religious and patriotic values, scientific thinking, Arab culture, and the historical and cultural heritage of the people; all as shall be regulated by law. . . . The State shall safeguard the cultural and linguistic constituents of society, and foster the Arabization of education, science and knowledge.[179]

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[177] *See* Jessica Gray, *Egypt's Constitution Vote Rings Sharia Alarm Bells*, WENEWS (Dec. 13, 2012), http://womensenews.org/story/equalitywomen%E2%80%99s-rights/121212/egypts-constitution-vote-rings-sharia-alarm-bells#.Uiocn7Tn9Ms ("Egypt is slated to hold a vote . . . on a controversial draft constitution. For women concerned about divorce rights and FGM, the spotlight falls on the loosely worded Article 10.").

[178] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 81, http://www.sis.gov.eg/newvr/theconistitution.pdf.

[179] *Id.* arts. 10, 11, 12; *see* Basil El Dabh, *In Egypt's Draft Constitution, Ambiguity of Article 9 Susceptible to Dubious Interpretations*, ATLANTIC COUNCIL (Oct. 22, 2012), http://192.254.129.212/egyptsource/egypt%E2%80%99s-draft-constitution-ambiguity-article-9-susceptible-dubious-interpretations ("The new version of Article 9 introduces the terms 'cohesion' and

These vague and wide-ranging provisions in this document are problematic and permit the government to hamper a whole host of individual human rights on grounds not endorsed under international human rights law.[180] Since the "genuine nature or sincere character" of a family is undefined, this article could allow discrimination against women based on religion, religious interpretations, or perceived cultural norms.[181]

Additionally, Article 76—which already recently amended—regarding the personality (character) of the criminal punishment, as originally stated in the former Egyptian constitutional charters and all over the globe, provided that the only crimes and punishments can be those set by law, but Islamists amended the phrase to by law or by virtue of constitutional text.[182] As a consequence, criminal penalties such as bans on adultery, theft, attempted robbery, bank interest, and other misconduct could be imposed based on the Constitution's *Sharie'a* clauses, even if they are not passed into law by *majlis al-newaab* (Parliament).[183]

'stability,' raising concerns over the interpretation of those two words, particularly how they relate to divorce laws . . . . The Egyptian family is a sensitive topic of discussion and is a concept that can be used to frame specific visions for the role of women in society . . . . reflecting the 'complementary roles of men and women.'").

[180] "The vague language empowers private citizens to enforce Islamic morals . . . . It could even give a constitutional justification for the creation of religious police, known as commissions 'for the promotion of virtue and prevention of vice'" (known in Saudi Arabia as *gamaa't al-a'mer bel-m'ruf wa al-nahi 'an al-monker*). Maggie Michael & Lee Keath, *Charter Enshrining Shariah at Core of Egyptian Crisis*, ASSOCIATED PRESS (Dec. 7, 2012, 2:54 PM), http://bigstory.ap.org/article/charter-enshrining-shariah-core-egypt-crisis. The charter's lengthy Part I contains, among other provisions, the establishment of Islam as the official religion and the principles of Islamic *Sharie'a* as the main source of law, as well as the ambiguous and extensive Articles 10 and 11. These provisions, integrated with Article 219's interpretation of the Islamic law norms, could allow for numerous restrictions not allowed under international human rights law and not permitted under the real Islamic law.

[181] *See generally* Barry Rubin, *Egypt's New Constitution: Laying the Basis for an Islamist, Sharia State*, GLORIA CENTER (Dec. 3, 2012), http://www.gloria-center.org/2012/12/egypts-new-constitution-laying-the-basis-for-an-islamist-sharia-state/.

[182] *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept.11, 1971, as *amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, at art. 66; *cf.* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 76, http://www.sis.gov.eg/newvr/theconistitution.pdf.

[183] *See Constitution Enshrining Islamic Law Stands at Core of Egyptian Upheaval*, TIMES ISR. (Dec. 7, 2012), http://www.timesofisrael.com/constitution-enshrining-shariah-stands-at-core-of-egyptian-upheaval/ ("Thousands . . . oppose prominence of religion in country's draft charter . . . ensuring that laws and rights would be strictly subordinated to Islamic law. . . . 'This will not be a democracy that can allow what God forbids or forbid what God allows.'"). For further discussion on this point, *see* 'Arafa, *supra* note 159, at 186-197 (discussing the criminal taxonomy of crimes and punishments, the main principles of criminal law under the umbrella of the Islamic criminal justice system). *See also* M. CHERIF BASSIOUNI, THE ISLAMIC CRIMINAL JUSTICE SYSTEM (1982); MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 37-45 (1988).

Regarding women's rights, which are under this charter along with Islamism, Article 33 stipulates, "All citizens are equal before the law. They have equal public rights and duties without discrimination."[184] In this regard, Islamists omit the significant part of the article: "All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed."[185] One progressive improvement was that the final draft no longer embraces prior drafts on women's rights in Article 68, which stipulated that equal treatment for women could be subjected to conformity within Islamic law.[186] However, this provision no longer lists "sex or gender" as one of the grounds for prohibiting discrimination, and fails to identify whom it is meant to protect.[187] Furthermore, based on the last section of Article 10 concerning women's rights, the State's role should be restricted to ensuring equality and non-discrimination. The State should do this without any sort of interference with a woman's choices about her life, family, and profession, and also without violating international policies or playing with the interpretation of Islamic law provisions.[188]

Freedom of expression is circumscribed by the principles of State and society, national security, and other things, which means that any television channel or newspaper that says anything that can possibly be deemed contrary to

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[184] *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 33, http://www.sis.gov.eg/newvr/theconistitution.pdf; *cf.* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as *amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, at art. 40.

[185] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, as *amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, at art. 40; *see* Bradley Hope, *Religion's Role Central to Egyptian Constitution Debate*, NATIONAL (June 24, 2011), http://www.thenational.ae/news/world/middle-east/religions-role-central-to-egyptian-constitution-debate#ixzz2Fx9iYjGF ("Among the ideas that emanated from a body of work known as Islamic constitutionalism is the use of Sharia to dictate such diverse elements as how often divorced parents can see their children, the greater use of Islamic finance in the economy, and the creation of a religious body to advise the parliament on new laws.").

[186] *See generally* Vivienne Walt, *Women's Rights at Odds in Egypt*'s *Constitution Wars*, TIME (Dec. 9, 2012), http://world.time.com/2012/12/09/womens-rights-at-odds-in-egypts-constitution-wars/#ixzz2FTnFteVT ("For Egyptian women, the outcome of the constitutional dispute between Islamists and secularists could affect their ability to inherit property, to pass on citizenship to their children, to earn equal pay for equal work and even to make decisions independently of male family members. 'The role of women in society has been a contentious issue since the start of the transition[.]' . . . The . . . constitution . . . 'does not proactively provide for equality.'").

[187] 'Arafa, *supra* note 153, at 542-44. A list of particular prohibited causes, which comprised sex, religion, and origin, was deleted in the last draft, failing to reflect the non-exhaustive formulation included in the International Covenants, as interpreted by the Human Rights Committee and Committee on Economic, Social, and Cultural Rights. In this respect, the author thinks that the newly appointed constitutional committee needs to revise the legal language of this article and its interpretation. It might be copied from the 1971 *de facto* constitution as it will close the door for any grounds of discrimination against women.

[188] *Id.* In addition, the final draft omits language in the earlier drafts that prohibited women.

Sharie'a or Islamic morals as interpreted by a Muslim Brotherhood government can be shut down.[189] A National Media Council is responsible for maintaining and stabilizing *societal principles and constructive values*, which ostensibly means it can order publications, television stations, satellites, and networks to close down.[190] The constitutional document also confines the mandate of the most imperative judicial appliance in the Egyptian legal system, the Supreme Constitutional Court ("SCC"), which is one of the strongest opponents of Islamists.[191]

One of the most significant controversies resulting from this abrogated constitutional text is the enriched role and absolute immunity of the military. This deferred constitution fails to terminate military trials of civilians. Article 198 of the Constitution provides that civilians may not be tried before the military justice system except for crimes that harm the armed forces and this shall be defined by law and "determine the other competencies of the Military Judiciary."[192] This opens the door to oppressive rule again, by giving the military

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[189] *Id.* at 539-40; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 48, http://www.sis.gov.eg/newvr/theconistitution.pdf. This article states:

> Freedom of the press, printing, publication, and mass media shall be guaranteed. The media shall be free and independent to serve the community and to express the different trends in public opinion, and contribute to shaping and directing in accordance with the basic principles of the State and society, and to maintain rights, freedoms and public duties, respecting the sanctity of the private lives of citizens and the requirements of national security. The closure or confiscation of media outlets is prohibited except with a court order. Control over the media is prohibited, with the exception of specific censorship that may be imposed in times of war or public mobilization.

[190] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 215, http://www.sis.gov.eg/newvr/theconistitution.pdf. ("The National Media Council shall regulate the affairs of radio, television, and printed and digital press, among others. The Council shall ensure the freedom of media in all its forms, safeguard plurality, fight centralization and monopoly, protect the interests of the public, and establish rules and regulations that ensure the commitment of media to adhere to professional and ethical standards, to preserve the Arabic language, and to observe the values and constructive traditions of society.").

[191] It should pointed out that Islamists also wrote a last-minute article reducing the court to eleven Chief Justices, from eighteen, eliminating its younger members. *See* Michael & Keath, *supra* note 180 ("That removes some of the fiercest anti-Islamist judges on the body, such as the court's only female judge Tahni Al-Gibali"). These provisions provide "[t]he first Supreme Constitutional Court, once this Constitution is applied, shall be formed of its current President and the [ten (10)] longest-serving judges among its members. The remaining members shall return to the posts they occupied before joining the court" and "The Supreme Constitutional Court is made up of a president and ten members. The law determines judicial or other bodies that shall nominate them and regulates the manner of their appointment and the requirements to be satisfied by them. Appointments take place by a decree from the President of the Republic." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at arts. 233, 176. http://www.sis.gov.eg/newvr/theconistitution.pdf.

[192] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 198, http://www.sis.gov.eg/newvr/theconistitution.pdf. The language in the rights chapter in the earlier drafts was

absolute discretion to try civilians under the Code of Military Justice. In addition, the provision intends to make the military admit a Muslim Brotherhood proposal by establishing a *majlis al-defa'a al-watani* ("National Defense Council"), with a majority of officers, to set the military budget.[193] Generally speaking, military tribunals are biased and contravene numerous criterions of fair trial guarantees of due process, including the right to a fair and public hearing before a competent, independent and impartial courthouse established by law; the right to have sufficient and adequate time to prepare a defense; the right to be defended by an attorney of one's choosing; and the right to appeal a conviction (verdict) and sentence to a higher tribunal.[194]

"No civilian shall be tried before the military justice system." *See Egypt: New Constitution Mixed on Support of Rights*, *supra* note 145. Constituent Assembly members omitted this wording "after military justice officials formally objected." *Id.* Article 198 states:

> The Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the Armed Forces, its officers and personnel. Civilians shall not stand trial before military courts except for crimes that harm the Armed Forces. The law shall define such crimes and determine the other competencies of the Military Judiciary. Members of the Military Judiciary are autonomous and cannot be dismissed. They share the immunities, securities, rights and duties stipulated for members of other judiciaries.

CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 198, http://www.sis.gov.eg/newvr/theconistitution.pdf.

[193] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 197, http://www.sis.gov.eg/newvr/theconistitution.pdf. This was a major request of the armed forces. The provision provides the following:

> A National Defense Council shall be created, presided over by the President of the Republic and including in its membership the Speakers of the House of Representatives and the Shura Council, the Prime Minister, the Minister of Defense, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Interior, the Chief of the General Intelligence Service, the Chief of Staff of the Armed Forces, the Commander of the Navy, the Air Forces and Air Defense, the Chief of Operations for the Armed Forces, and the Head of Military Intelligence. The Council is responsible for matters pertaining to the methods of ensuring the safety and security of the country and to the budget of the Armed Forces. It shall be consulted about draft laws related to the Armed Forces. Other competencies are to be defined by law. The President of the Republic may invite whoever is seen as having relevant expertise to attend the Council's meetings without having their votes counted.

Id.

[194] For further details on the criminal safeguards in the criminal justice system, *see generally* JOHN N. FERDICO, HENRY F. FRADELLA & CHRISTOPHER D. TOTTEN, CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL (11th ed. 2009); KÄREN M. HESS & CHRISTINE HESS ORTHMANN, CRIMINAL INVESTIGATION (9th ed. 2010) (explaining coverage of modern investigative tools alongside discussion of established investigation policies, procedures, techniques for the law enforcement officer, federal law enforcement investigations, report writing, preparing, and presenting cases in court); *see also* Stephanos Bibas & William W. Burke-White, *International*

Concerning the status of international commitments, Article 145 states:

> The President of the Republic shall represent the State in foreign relations and shall conclude treaties and ratify them after the approval of the House of Representatives and the Shura Council [lower house]. Such treaties shall have the force of law after ratification and publication, according to established procedures. Approval must be acquired from both Legislative Houses with a two-thirds majority of their members for any treaty of peace, alliance, and all treaties related to the rights of sovereignty.[195]

The suspended Constitution fails to provide for the supremacy of international law over national law, raising concerns about Egypt's commitment to human rights treaties to which it is a state party.[196] Thus, it is very important to comprise a direct and explicit provision that indicates and integrates human rights, as defined by international conventions ratified by Egypt into the Egyptian legal system, to reinforce the basis for amending various domestic laws that restrict rights. Reforming these laws should be a legislative priority.[197]

Idealism Meets Domestic-Criminal-Procedure Realism, 59 DUKE L.J. 637, 638 (2010) ("[I]n blending adversarial and inquisitorial systems, international criminal justice has jettisoned too many safeguards of either one. It should reform discovery, speedy-trial rules, witness preparation, cross-examination, and victims' rights in light of domestic experience. Just as international criminal law can benefit from domestic realism, domestic law could incorporate more international idealism and accountability, creating healthy political pressures to discipline and publicize enforcement decisions."); Lester B. Orfield, *Trial by Jury in Federal Criminal Procedure*, 29 DUKE L.J. 29, 29 (1962) ("Article III of the United States Constitution provides that 'The Trial of all Crimes except in Cases of Impeachment, shall be by jury . . . .' Further, the sixth amendment provides that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; by an impartial jury . . . .' This right to jury trial has traditionally been one of the most important rights of the criminal defendant. Rule twenty-three of the Federal Rules of Criminal Procedure, governing jury trial in the federal courts, implements these constitutional jury trial requirements.").

[195] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 145, http://www.sis.gov.eg/newvr/theconistitution.pdf.

[196] Though Egypt is a state party to a number of international human rights agreements, including the ICCPR, Economic, Social, and Cultural Rights ("ICESCR"), and the Convention on the Elimination of All forms of Discrimination Against Women ("CEDAW"), the constitution does not expressly set out Egypt's duties under each provision of those universal conventions, or make them directly enforceable to all individuals under Egyptian law.

[197] *See* Press Release, Amnesty Int'l, Egypt's New Constitution Limits Fundamental Freedoms and Ignores the Rights of Women (Nov. 30, 2012), *available at* http://www.amnesty.org/en/for-media/press-releases/egypt-s-new-constitution-limits-fundamental-freedoms-and-ignores-rights-wom ("A . . . constitution approved by Egypt's Constituent Assembly falls well short of protecting human rights and, in particular, ignores the rights of women, restricts freedom of expression in the name of protecting religion, and allows for the military trial of civilians . . . . 'This document, and

Regarding the freedom to form associations and unions, the 2012 Constitution allowed only one trade union for each profession.[198] This has veiled consequences since, in the past, the State has managed and controlled the only trade union in each field.[199] Surely, physicians, reporters and journalists, engineers, attorneys, or members of other professions are exhausted from being in associations controlled by Islamists because they cannot form their own separate groups.[200]

Similarly, the President can force the Parliament to meet in secret rather than publicly according to Article 93.[201] This provision provided lawmakers no power or legal opinion on the decision, and makes policymakers and commentators doubtful about how often the President will dictate or dominate the

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the manner in which it has been adopted, will come as an enormous disappointment to many of the Egyptians who took to the streets to oust Hosni Mubarak and demand their rights' . . . .").

[198] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 53, http://www.sis.gov.eg/newvr/theconistitution.pdf ("Trade unions are regulated by law and managed on a democratic basis, the accountability of their members subject to professional codes of ethics. One trade union is allowed per profession. Authorities may not disband the boards of trade unions except with a court order, and may not place them under sequestration.").

[199] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, as *amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, at arts. 55, 56 ("Citizens shall have the right to form societies as defined by law. The establishment of societies whose activities are hostile to the social system, clandestine or have a military character shall be prohibited. . . . The creation of syndicates and unions on democratic basis shall be guaranteed by law and shall have a legal person. The law regulates the participation of syndicates and unions in carrying out the social plans, and programmes raising the standard of efficiency, consolidating socialist behavior among their members, and safeguarding their funds. They are responsible for questioning their members about their behaviour in exercising their activities according to certain codes of morals, and for defending the rights and liberties of their members as defined by law."). The second paragraph was amended by the constitutional reform of March 26, 2007). After the amendment, it stipulated: "The law regulates the participation of syndicates and unions in carrying out the social programs and plans, raising the standard of efficiency among their members, and safeguarding their funds." *Id.*

[200] *See* Ayman Mohyeldin, *Analysis: Who's Afraid of the Egyptian Constitution?*, TIME (Dec. 5, 2012), http://ideas.time.com/2012/12/05/viewpoint-whos-afraid-of-the-egyptian-constitution/#ixzz2FdcYeePM ("Egyptians—and people all over the world—are asking, 'Will this document chart a way forward that lives up to the sacrifices of the people and the promise of the revolution? Will it uphold universal values and norms?' "). In this sense, some scholars support the general policies for a free market economy, including Article 29, which limits when the government can nationalize corporations and industries. *See id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 29, http://www.sis.gov.eg/newvr/theconistitution.pdf ("Nationalization shall not be allowed except for in consideration of public interest, in accordance with the law and against fair compensation.").

[201] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 93, http://www.sis.gov.eg/newvr/theconistitution.pdf ("The sessions of the House of Representatives and the Shura Council shall be held in public. However, closed sessions may be held at the request of the President of the Republic, the Prime Minister, or at least [twenty (20)] of its members. The House of Representatives or Shura Council shall then decide whether the debate on the question submitted thereto shall take place in public or closed sessions.").

upper house, since one man reined over Egypt for such a long period; during which, the Senate was akin to a rubber stamp with no momentous inspiration.[202] Besides, anything critical of the regime, including the government, can be kept clandestine.[203] Another provision, which only allows Parliament to reverse or overturn a *presidential veto* on laws by a two-thirds majority, promotes this concern.[204] In the same vein, there is no maximum cap identified for the number of assembly members, raising suspicions that the President and the Islamists' political party can add more individuals if needed to sustain control.[205] Some parliamentary democracies adopted a practice that if the lower house (*Shoura* Council) does not approve the government platform or strategy set by the President, the President can dissolve the Parliament.[206] Since Parliament members do not like to be forced to run for reelection and perhaps lose their seats, this pressures them to accept the President's plans and strategies.[207] Also, Article 202 gives the President an absolute authority to appoint the heads or chiefs of several public institutions.[208]

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[202] *See* Rubin, *supra* note 181.

[203] *Id.*

[204] *Id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 104, http://www.sis.gov.eg/newvr/theconistitution.pdf ("The House of Representatives shall notify the President of the Republic of any law passed for the President to issue the new law within [fifteen (15)] days from the date of receiving it. In case the President objects to the law, it must be referred back to the House of Representatives within [thirty (30)] days. If the draft law is not referred back within this period, or if it is approved again by a majority of two-thirds of the members, it shall be considered a law and shall be disseminated as such. If it is not approved by the House of Representatives, it may not be presented in the same session before four [(4)] months have passed from the date of the decision."). Of course, this is similar as in the U.S. Constitution which states that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent . . . ." *See* U.S. CONST. art. I, § 7, cl. 2.

[205] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at arts. 114, 128, http://www.sis.gov.eg/newvr/theconistitution.pdf.

[206] *Id.* at art. 139, http://www.sis.gov.eg/newvr/theconistitution.pdf ("Otherwise, the President of the Republic shall dissolve the House of Representatives and call for the elections of a new House of Representatives within [sixty (60)] days from the date the dissolution is announced. In all cases, the sum of the periods set forth in this Article should not exceed [ninety (90)] days. In the case of dissolution of the House of Representatives, the Prime Minister shall present the Cabinet and its plan to the new House of Representatives at its first session."

[207] *Id.* This rule again will open the door for suspicious given Egypt's history and the regime's dictatorship philosophy.

[208] *Id.* at art. 202 ("The President of the Republic shall appoint the heads of independent bodies and regulatory agencies upon the approval of the Shura Council, for a period of four [(4)] years, renewable once. They shall not be deposed except with the consent of a majority of the members of the Council; all prohibitions upon ministers shall be imposed upon them.").

However, Article 36 prohibits torture, suppression, and other ill-treatment, including the use of "confessions" extracted under coercion and cruelty in criminal proceedings. The various inaccurate interpretations from the Islamic perspective under the umbrella of Article 219—which the author calls for omission—may allow for the implication of corporal punishments that infringe upon the prohibition of cruel, inhuman, and humiliating punishment stated by universal norms.[209] One of the virtuous achievements assured by Article 35 dealt with the arrest and detention of any individual based on a reasonable judicial warrant (order): "Except in cases of flagrante delicto, no person may be arrested, inspected, detained or prevented from free movement except under a court order necessitated by investigations."[210] "Any person arrested or detained must be informed of the reasons in writing within [twelve (12)] hours, be presented to the interrogating authority within [twenty-four (24)] hours from the time of arrest, be interrogated only in the presence of a lawyer, and be provided with a lawyer when needed."[211]

The person arrested or detained, and others, have the right of appeal to the courts against the measure of arrest. If a deci-

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[209] *Id.* at arts. 219, 36 (Article 36 states: "Any person arrested, detained or whose freedom is restricted in any way, shall be treated in a manner preserving human dignity. No physical or moral harm shall be inflicted upon that person. Only places that are humanely and hygienically fit, and subject to judicial supervision, may be used for detention. The violation of any of the above is an offense punishable by law. Any statement proved to have been made by a person under any of the aforementioned forms of duress or coercion or under the threat thereof, shall be considered invalid and futile.").

[210] *Id.* art. 35. Furthermore, "The private life of citizens is inviolable. Postal correspondence, wires, electronic correspondence, telephone calls and other means of communication shall have their own sanctity and secrecy and may not be confiscated or monitored except by a causal judicial warrant." *Id.* art. 38.

[211] *Id.* art. 35. Additionally, "Prison is a place of discipline and reform, subject to judicial supervision, where anything that is contrary to human dignity or a person's health is prohibited. The State is responsible for the rehabilitation of convicts and facilitating a decent life for them after their release." *Id.* art. 37. In the same sense, both Articles 39 and 40 provide:

> Private homes are inviolable. With the exception of cases of immediate danger and distress, they may not be entered, searched or monitored, except in cases defined by law, and by a causal judicial warrant which specifies place, timing and purpose. Those in a home shall be alerted before the home is entered or searched. . . . All residents have a right to secure life which is safeguarded by the State, and are protected by law against criminal threats.

Id. arts. 39, 40.

> sion is not provided within a week, release becomes imperative. The law regulates the rules for temporary detention, its duration and causes, and cases of entitlement to compensation, whether for temporary detention or for a sentence carried out that a court final ruling has revoked.[212]

On the other hand, this suspended charter boasts few achievements to preserve economic, social, and cultural rights, despite the fact that demonstrators against fallen President Hosni Mubarak demanded fair distribution of wealth among all Egyptian social classes.[213] However, Article 67, under the Islamist Constitution, which declared the right to adequate housing, does not explicitly proscribe forced evictions; especially in informal settlements, which are illegitimate under international human rights law.[214]

Likewise, the 2012 constitutional text has also failed to protect the rights of children. It does not define a child as "every human being below the age of eighteen years," as provided for in the International Convention on the Rights of the Child ("CRC"), and does not protect children from early marriage.[215]

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[212] *Id.* art. 35. On the temporary and preventive detention, its duration, its cases, and its causes in the Egyptian criminal proceedings system, see generally MOHAMMAD ZAKY ABOU'AMER, KANOUN AL-IJRA'AT AL-JINA'IYAH [CRIMINAL PROCEDURAL LAW] (2008/Arabic source) (on file with author).

[213] 'Arafa, *supra* note 153, at 528-29; *see* Bill Frezza, *Forget Sharia, The New Egyptian Constitution Enshrines Socialism*, FORBES (Dec. 19, 2012, 9:48 AM), http://www.forbes.com/sites/billfrezza/2012/12/19/forget-sharia-the-new-egyptian-constitution-enshrines-socialism/ ("It isn't every day that the world gets to watch the birth of a new constitutional democracy. As the political drama in the land of the Pharaohs unfolds, the Western commentariat seem totally focused on the extent to which Egypt's new constitution will be informed by Sharia law . . . . Evidence abounds on what works and what doesn't, of which economic policies lead to rapid growth and which to stagnation and bankruptcy . . . . [T]he Egyptian people appear set to go to the polls to endorse . . . socialism.").

[214] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 67, http://www.sis.gov.eg/newvr/theconistitution.pdf. *See also Forced Evictions: Violation of Human Rights – Global Survey No. 8*, CENTRE ON HOUSING RTS. & EVICTIONS (2002), http://www.cohre.org/sites/default/files/global_survey_on_forced_evictions_8_june_2002.pdf.

[215] *See generally* Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1976). Article 32 stipulates:

> 1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
> 2. States Parties shall take legislative, administrative, social, and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
> (a) Provide for a minimum age or minimum ages for admission to employment;
> (b) Provide for appropriate regulation of the hours and conditions of employment;

Furthermore, Article 70 "permits children who are still in primary education to work, as long as the work is 'adequate for their age.'"[216] The article does not ensure children protection from economic exploitation, abuse, or performing any work that is likely to be hazardous, as required by the CRC.[217] The constitutional provisions also fail to fulfill other universal agreements on children's rights ratified by Egypt, including the Minimum Age Convention, and the Worst Forms of Child Labour Convention.[218]

However, Morsi and this organization's constitutional charter included sections on personal rights, included guarantees of freedom of belief, creative and political expression, and the press. Additionally, many of these rights are more firmly worded than they were in past constitutions under Mubarak and his predecessors, Presidents Gamal 'abdel Nasser, and Mohammad Anwar El- Sâdât; yet, there are still issues that require amending.[219] Numerous Egyptians have

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(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

[216] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 27, 2012, at art. 70, http://www.sis.gov.eg/newvr/theconistitution.pdf ("Every child, from the moment of birth, has the right to a proper name, family care, basic nutrition, shelter, health services, and religious, emotional, and cognitive development. The State shall care and protect the child in the case of the loss of family. The State also safeguards the rights of disabled children, and their rehabilitation and integration into society. Child labor is prohibited before passing the age of compulsory education, in jobs that are not fit for a child's age, or that prevent the child from continuing education. A child may only be detained for a specified period, must be provided with legal assistance, and be held in a convenient location, taking into account separation according to gender, ages and type of crime, and be held away from places of adult detention.").

[217] Convention on the Rights of the Child, *supra* note 215, at art. 39 ("States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.").

[218] *See generally* Int'l Labour Org., Minimum Age Convention, C138 (June 26, 1973), http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C138; *see also* Int'l Labour Org., Worst Forms of Child Labour Convention, C182, (June 17, 1999), http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C182.

[219] *See* Rubin, *supra* note 181 ("Presumably, however, this changes nothing since conformity with Sharia law is already mandated in the Constitution. . . . It enshrines Sharia rule without rubbing people's faces in it. Thus, the Western media and governments can cheer the constitution as democratic and proof that Islamists are now moderate even though that document opens the door for dictatorial rule."); *see generally* Leila Fadel, *Morsi Wins and Loses after Egypt Passes Draft Constitution*, NPR (Dec. 22, 2012), http://www.npr.org/blogs/thetwo-way/2012/12/22/167878598/constitution-vote-seen-as-referendum-on-egyptian-brotherhood; *see also* Billy Hallowell, *Egypt's Muslim Brotherhood Clarifies: Shariah Must Be Basis of New Constitution*, BLAZE (Oct. 31, 2012, 8:56 PM), http://www.theblaze.com/stories/2012/10/31/egypts-muslim-brotherhood-clarifies-shariah-must-be-basis-of-new-constitution/ ("Egypt's powerful Muslim Brotherhood says Islamic Shariah law must be the basis of Egypt's new constitution, and legislation must be based on Islamic penal code. The Brotherhood said . . . that a country ruled by Shariah would

enunciated deep concerns and fears about the substance and the main body of the constitutional document, the constitutional process, and the amendment process. At this current historical moment, all of Egypt must share a special responsibility to move forward in a way that recognizes the urgent need to bridge divisions, build trust, and broaden livelihood for the political process. Moreover, the main ambitions the government is working toward are plugging the budget deficit, working on increasing growth to boost employment rates, curbing inflation, and escalating the competitiveness of Egyptian exports will require diligent cooperation from all of Egypt.[220]

IV. Conclusion: Egypt's Democracy Today, Its Future, and Policy Recommendations

The recent events in Egypt have made history and surprised the world. What began as a modest attempt to transform nationwide dissatisfaction with the way Islamist President Mohammad Morsi has ruled Egypt, the *Tamarod* ("Rebel") campaign mobilized millions of Egyptians for a demonstration that promises to be a marathon on the anniversary of Morsi's inauguration. Though opposition forces primarily kept the signature drive that stresses Morsi's exclusion from office and early elections at arms' length, nearly all the appropriate players in Egypt's transitional drama now recognize the campaign's significance and its fundamental role to affect change.

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not become a theocracy."); *see* Salma Abdelaziz, *Morsy Signs Egypt's Constitution into Law*, CNN (Dec. 26, 2012), http://www.cnn.com/2012/12/25/world/africa/egypt-constitution/index.html ("Supporters of the constitution herald what they say is its protection of personal rights, especially its provisions on the handling of detainees in the judicial system, which made capricious use of its powers under the former government. The international rights group Human Rights Watch said the constitution 'protects some rights but undermines others.' It 'fails to end military trials of civilians or to protect freedom of expression and religion.' ").

220 *See generally Egypt's President Morsi Hails Constitution and Urges Dialogue*, BBC News (Dec. 26, 2012), http://www.bbc.co.uk/news/world-middle-east-20846014 ("President Mohammed Morsi has congratulated Egyptians for endorsing a new constitution and urged all parties to join him in a national dialogue."); *see also* Michael Lipin, *Egypt's New Constitution: How it Differs from Old Version*, Voice Am. (Dec. 25, 2012), http://www.voanews.com/content/egypt-constitution/1572169.html. ("Egypt's new constitution, approved by voters in a two-stage referendum . . . replaces a 1971 charter that was suspended . . . after a popular uprising deposed longtime President Hosni Mubarak . . . . Both constitutions designate Islam as Egypt's official religion and Islamic law, or Sharia, as the main source of legislation. They also obligate the state to 'preserve' traditional family values based on Islam. But in a key difference, the 2012 charter defines the principles of Sharia for the first time. It says those principles include 'evidence, rules, jurisprudence, and sources' accepted by Sunni Islam, Egypt's majority religious sect. The new document also gives unprecedented powers to Al-Azhar, Sunni Islam's most respected religious school, by saying its scholars must be consulted on all matters relating to Sharia. The 1971 charter did not mention Al-Azhar.").

The first democratically civilian elected President took office on June 30, 2012, only to be removed by the military after barely completing his first year in the Office of the Republic. This removal came out after a big revolution against Morsi due to his failure to govern the country politically, economically, socially, legally, and constitutionally. On July 3, 2013, after the ousting of longtime President Hosni Mubarak in 2011, in what was then the most dramatic and substantial development of the Arab Spring, the Egyptian military via its Supreme Commander Lieutenant General 'Abdul-Fattah el-Sisi removed President Morsi—Head of the Muslim Brotherhood—from Office of the Republic. The Military's Supreme Council ("MSC") issued the President an ultimatum: meet street demonstrators' demands for a more comprehensive government that would strengthen the voice of opposing parties, or be forced from office.

> The majority of Egyptian people today see the army as a patriotic institution that can be trusted to act in the interests of the nation . . . . The army has this reputation despite the fact that it has actually on many occasions, and especially in the recent years, acted to secure its own particular institutional interests and not acted for the interests of the nation.[221]

The public rights and freedoms in this *de facto* constitutional document are articulated but not guaranteed as in the previous Egyptian constitutions. These freedoms were limited by the presumed future abuses and restrictions that Islamist legislation and arbitrary religious statutes would create if the Islamists were still in power as they were before the June 30th revolution. Theoretically, based on the lack of a unified front and vision, the system adopted a mixture between parliamentary and presidential systems, but did not dramatically change the absolute presidential powers. The President retained most of the significant powers, with no real equilibrium between the President and the Prime Minister, no imperative alteration in the structure of government, and no checks and balances. This is very problematic for a democratic state that is trying to promote "rule *of* law," not "rule *by* law."

Before the exile of Morsi and the fall of his Islamist regime and the Brotherhood, the Intra-Islamic dynamic dictated most of the legislative process. The Muslim Brotherhood was very decisive with liberals; it expressed that there are not enough *Sharie'a* or religious powers in the Constitution. The various Islamist groups defined the Constitution with a stark religious approach in their efforts to rally votes through sectarian tactics. For Islamists, this Constitution

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[221] *See* Anna Kordunsky & Michael Lokesson, *The Egyptian Military's Huge Historical Role*, NAT'L GEOGRAPHIC (July 5, 2013) (internal quotation marks omitted), http://news.nationalgeographic.com/news/2013/07/130705-egypt-morsi-government-overthrow-military-revolution-independence-history/.

was "Pro-*Sharie'a* and Anti-*Sharie'a*, Pro-Islam and Anti-Islam," which is the way the battle was couched in the Egyptian political environment. Islamists feel that this abrogated Constitution was not sufficiently Islamic. In contrast, the opposition (liberals) think that public rights and freedoms are non-negotiable.

The author argues that this constitution was a compromise between the liberal vision and the *Salafis*'s (extreme, radical Islamists) viewpoint, and that the Brotherhood members would be the median voters in the previous Constituent Assembly. This demonstrates how *Salafis* and the Muslim Brotherhood were dragged into the political spectrum. In other words, this is a "game with no rules."

Under the Morsi regime, the Islamic competition was expected to be prevalent in every government institution. This widespread role in the government makes the *al-azahar* foundation a contentious topic for Islamists. At the time of drafting this constitutional text, the political, economic, social, and cultural difficulties produced violence, controversy between parties, lack of judicial review concerning the referendum process, forging, rigging of polls, and various irregularities and violations. Certainly, this constitutional document was very fragile and delicate. This was one of the main reasons behind the massive uprising that resulted in Morsi's fall from power. Additionally, Islamists wanted less judicial review, which created a rift in the Egyptian judiciary and led to the presence of a "conservative judiciary."

The United States has a primary interest in Egypt's stabilization because stability, security, and consistency in Egypt yield stability in the Middle Eastern region, which affects key U.S. relationships in the Arabian world. This stability does not come only from national security interests or economic stabilization. It requires political compromise—a strategy that Egypt is lacking. The U.S. must recognize two main principles: how it achieved and implemented the democratic process while ensuring the basic rights of women and religious minorities. This inquiry requires assessing the democratic process. Failure to implement democracy would not only hurt Egypt, but it could hinder the U.S.'s ability to advocate for democracy and human rights across the globe. It is crucial to have one common vision as "liberal Islamists" and to move away from Islamists and non-Islamists factions so that the focus shifts to fundamental matters like economic polarization and the nature and identity of the State. In contrast to the liberals, Islamists do not think the State should have neutral ideologies; but rather, the State should be the protector of a certain understanding of morality and religious practice. Additionally, serious failures of leadership and deep divisions in society—which are common to some extent in every society—prevent people from coming together. The 2013 amended Constitution is supposed to ensure unity, rather than create an adversarial society

revolving around winning or losing. A true majority is important for maintaining justice that will not threaten. Egypt must diverge from its "rule by law" past and begin a new era with a just and democratic political structure.