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**Letter from the Editor-in-Chief**

As another academic year comes and goes, it is hard to believe that the time to publish our yearly journal has finally arrived. As one of the few undergraduate law publications in the nation, Florida Atlantic University's Undergraduate Law Journal has provided students with the opportunity to publish their legal related research with the help of faculty mentors over the past 7 years. This notable feat would not be possible if it were not for the good grace, hard work and enduring patience of our faculty mentors, editorial board and authors. By expanding the legal interests of students from a variety of academic backgrounds, the Undergraduate Law Journal fosters thought provoking discussions, provides students with a plethora of pre-law school benefits and allows students with a mutual appreciation and interest for the law to assemble and network. As I finish my undergraduate career here at FAU, I would like to personally extend my thanks and appreciation to all our faculty advisors, editorial board and authors who have made this edition possible, especially Dr. Cheryl Arflin, as this would be nothing without all your time and effort. I also want to extend my thanks to all our readers and supporters who inspire and motivate us to make the best product possible. As students continue to participate and take an interest in publishing their law related articles, I am eager to see what the future holds for the expansion of the Undergraduate Law Journal. I am very grateful to have been a part of this experience as Editor in Chief and will reminisce upon it for years to come. I conclude with a message to all future ULJ readers and participants: "In life, never tell others that you are going to accomplish great things. Just accomplish great things and let them ask you about it later."

Sincerely,
Renzo Broggi
Editor-in-Chief, Undergraduate Law Journal, 2017

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voters voted in jurisdictions that used Direct-Recording Electronic (DRE) voting machines that store vote counts directly into the memory of a computer network. This system lacks a paper trail that could be used to audit the accuracy of the automated vote counts in the event of a data breach in the network. This article explores the vulnerability of our voting systems and demonstrates the need for federal cybersecurity standards that must be met by all states and localities.



With the rise of technology and communication via social media, we have grown to seek and depend on sites such as Facebook to obtain our daily news information. Protected by the first amendment, publishers allow the creation of fraudulent news stories that are published all over sites to gain attention or mislead readers. A goal to end this ethical violation, faces various challenges when considered being acted upon and written into law. However, if we take special consideration and write the law carefully, we should be able to find a way in which we are capable of stopping this unethical allowance while making sure innocent people do not suffer a harsh injustice.



The road to innovation can be a collaborative ideal, sharing insights, open access, research in vital areas and includes an economic generator that identifies foundational principles, constitutional ideals, ethics, and a system of management that embraces principles of democracy. Freedom of innovation promotes ideas, generates commerce, and enables the development of share values. How can we best protect our emerging ideas and business investment opportunities to plan for a future where principles are supported by an international body, and where our judicial, legislative, and executive procedures that help citizens regenerate our middleclass value system?

This article explores the importance of political participation to a democracy's integrity. For a government to be representative of its people, the people must make efforts to articulate their interests and find ways to implement them in government. The most iconic symbol of a democratic society is the right to vote. However, many citizens (especially youth), do not use this right to their advantage for many reasons. Youth in Italy, for example, have ostensibly lower rates of voting in comparison to the older population and show little interest in voting because they have no interest in politics. They feel as if it does not affect them and is inconsequential. Not only is this a sentiment expressed in Italy, but there is a global resurgence of political apathy amongst youth, reasons for which will be further discussed in the paper.



"Death Spiral Financing" refers to a certain type of Private Investment in Public Equity (PIPE), generally used by companies in financial trouble. We will show how these transactions can lead to the devaluation, and even the destruction of companies involved. While not illegal, these deals take advantage of loopholes within the Securities Exchange Commission's (SEC) regulations regarding disclosure requirements of transactions involving securities. First we will briefly describe the mechanism of PIPE deals in general. Then we will focus on the so called "toxic" PIPEs. We will present how the SEC has raised claims (mainly unsuccessfully) against such practices in at least one of two categories: sale of unregistered securities, and insider trading. We will conclude by arguing that such transactions need to be more carefully scrutinized, as well as subject to stricter disclosure requirements in order to protect and better inform the "unsuspecting public."



On November 4th, 2013, global health care giant Johnson & Johnson and its subsidiaries reached a settlement amount of $2.2 billion dollars. Considered

one of the largest health care fraud settlements in United States history, Johnson & Johnson agreed to pay this amount to resolve the civil and criminal allegations of promotions not approved as safe and effective, kickbacks to physicians, and violations of statutes particularly violations of the False Claims Act. This type of offense has been common with pharmaceutical companies in the past ten years in regards to false advertising, but the federal government still gives pharmaceutical companies tax breaks for advertising which represents billions of dollars in lost revenue for the federal government.



On behalf of their daughter, the E.F. Fry family sued Napoleon Community School for damages citing emotional humiliation, which was not covered under the Individuals with Disabilities Education Act (IDEA), but instead was covered under the Americans with Disabilities Act (ADA). However, the ruling of the U.S. Court of Appeals for the sixth circuit found their educational demands to be protected under the IDEA, and thus, they needed to go through the administrative system of exhaustion which is required under the IDEA.



The article examines how privatization of the prison industries has adversely affected our judicial system. Private Prison Industries use the prison system as a form of cheap labor to make a profit. The issue with the emergence of private prison industries is that it injects potential bias into the judicial system. The current interpretation of these amendments allow the government and private prison industries to compel and control prisoners' labor. This affects the justice system because verdicts may be based upon the need to meet quotas in order to comply with government contracts with the private prison industries, insuring certain profit levels for the private prisons.

# Can the Defendant Even Rise? – A Brief Analysis of the Laws Governing Abortion and Fetal Rights in the State of Florida

by Renzo Broggi

## Introduction

The legal quandaries surrounding abortion and fetal rights represents contentious topics in contemporary American political discourse, a topic which is vehemently argued between conservatives and liberals to this very day. The issue was brought into the national spotlight when the Supreme Court delivered its landmark decision in the 1973 case of *Roe v. Wade*.[1] The case was originally decided by the United States District Court of the Northern District of Texas, which ruled that the criminality status of abortion laws in Texas were unconstitutional. The Supreme Court's decision affirmed in part the District Court's decision and ruled that abortion was legal under certain circumstances determined by the trimester phase and the impact the childbirth would have on the health of the mother. The ruling was specific in regards to allowing women to choose if they want to undergo the abortion procedure during the first trimester and implemented a nearly universal standard for all states to follow. However, it remained vague on the authority given to states in circumstances involving post first trimester.

While advancements have been made regarding a woman's right to choose whether she wants to undergo an abortion post *Roe v. Wade*, this consequently has also lead to a rise in fetal rights advocacy. In the State of Florida and at least 37 other states, there are "fetal homicide" laws in place which govern how to deal with the homicide or manslaughter of a fetus.[2] It is interesting to note this dichotomy, some regard the termination of the fetus as legal and the other side regards it as illegal. As the late President Ronald Reagan stated in a 1984 presidential debate against his Democratic challenger Walter Mondale, "Now, isn't it strange that that same woman could have taken the life of her

[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Fetal Homicide State Laws*, NCSL.org , 2017, http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx, (last visited March 25, 2017).

unborn child, and it was abortion and not murder, but if somebody else does it, that's murder?"[3]

**Evolution of Laws Governing Abortion on the Federal Level**

Contrary to popular belief, *Roe v. Wade* neither fully legalized abortion nor was abortion fully illegal prior to the ruling. The issue of abortion was primarily handled on a state by state basis before the *Roe v. Wade* ruling, which meant that there were no federal standards in regards to how procedures were performed or regulated. There were also states where abortion was completely illegal unless the life of the mother was threatened.[4] One of the states which had the most stringent regulations regarding abortion was New York. Until 1970 a woman in New York and the person performing the abortion could be imprisoned for their actions.[5] While abortion largely remained a state legislative issue during the period, this was changed by the national attention given to the issue of abortion. *Roe v. Wade* may have been the primary case regarding federal implementation of abortion regulations, however the issue was discussed on a federal level prior to the ruling.

In the 1971 case of *United States v. Vuitch*,[6] the person who performed abortions was required to be a certified physician. Specifically, the court stated that, "The Supreme Court … held that under such law, which prohibits abortion unless 'necessary for the preservation of the mother's life or health,' the burden is on the prosecution to plead and prove that abortion was not necessary for the preservation of the mother's life or health, and abortion is permitted for mental health reasons whether or not patient has previous history

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[3] *Ronald Reagan: Debate Between the President and Former Vice President Walter F. Mondale in Louisville, Kentucky*, The American Presidency Project, Presidency.ucsb.edu, http://www.presidency.ucsb.edu/ws/?pid=39199, (last visited April 5, 2017).

[4] Linda Greenhouse & Reva B Siegel, *Before Roe v. Wade*, 120 Yale L.J. 2028 (2011), http://www.yalelawjournal.org/feature/before-and-after-roe-v-wade-new-questions-about-backlash, (last visited April 5, 2017).

[5] Id.

[6] *United States v. Vuitch*, 402 U.S. 62 (1971).

of mental defects; and that, as thus construed, the abortion law is not unconstitutionally vague.[7] The crucial aspect which led to the Court's decision in *Vuitch* was based on the 14th amendment and their interpretation of what constitutes a human being. Accordingly, a human fetus that had not reached the point of viability, essentially a medical determination on whether the fetus will have the capability of being brought to term, was not considered as a human being in regards to the 14th amendment by the court.

This case primarily concerned the Washington D.C. region, but it was a crucial step which provided the precedent necessary for the ruling of *Roe v. Wade*. This is evident in the opinion of the case, as it is noted that, ". . .perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense."[8] The ruling in *Roe v. Wade* provided precedent for countless abortion cases which followed, refocusing the issue of abortion from one which used to be primarily handled within the state's legislature all the way up to the federal level.

The shift in the balance of federal power regarding abortion regulation was again exemplified in the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[9] where the Supreme Court struck down some of Pennsylvania's abortion regulations from the 1980s, citing *Roe v. Wade* as its authority for precedent. One of the crucial aspects of this decision was regarding the change in the framework of abortion protocols, noting that, ". . .the undue burden test, rather than the trimester framework previously imposed, should be used in evaluating abortion restrictions before viability."[10] This change in regulation from the trimester framework to the undue burden standard entirely changed the standards for abortion, as the undue burden standard states that laws may not be implemented which impede upon one's constitutional rights.[11]

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[7] Id.
[8] Id.
[9] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[10] Id.
[11] "Undue burden," Legal Information Institute, https://www.law.cornell.edu/wex/undue_burden, (last visited April 5, 2017).

With this change, the burden of determining the viability of the unborn shifts from the doctor to the mother. However, this shift in the balance of power presents the mother of the unborn with a comprehensive reevaluation of the current standards and allows for more applicable justifications in regards to abortions. While the ruling on the *Planned Parenthood of Southeastern Pennsylvania v. Casey* case was a victory case for advocates of abortion, it also unnerves those concerned with the erosion of states' rights when merged with federal law, since the laws put in place by the State of Pennsylvania were voided by the Supreme Court's ruling. Regardless, the Supreme Court of the United States remains the ultimate judicial authority of the land and it is interesting to note how abortion over time has transitioned from a state issue over to the federal stage. This lessening of restrictions in the laws regarding accessibility to abortion has subsequently given rise to the issue of fetal rights, and consequently has given rise to state legislated stipulations to the existing federal regulations on abortion.

**Laws Governing Fetal Rights in the State of Florida and their Application**

Although the decisions implemented by Supreme Court rulings such as *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* produced laws which are legally binding in all 50 states, the federal-state balance of power has allowed states to enhance their regulations regarding the legality of abortions. Specifically, there has been an increase in fetal rights advocacy across states, which in turn has placed added emphasis on the value of the unborn fetus while simultaneously providing states freedom to regulate abortion within their own borders. In the state of Florida, from the year 2000 to 2008, there was a decline in the total numbers of abortions from 103,050 down to 94,360. This decrease was consistent with the national trend which went from 1,312,990 down to 1,212,350 during the same period.[12]

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[12] Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services In the United States*, 2008, Perspectives on Sexual and Reproductive Health , Volume 43, Number 1, March 2011, https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/4304111.pdf, (last visited April 5, 2017).

With the present declining trend, we can see that the implementation of fetal rights laws have had an impact on the number of abortions being performed throughout the United States. In the state of Florida there are extensive fetal rights laws in place which specifically define what an "unborn human" is and the protections available to them under the law. For instance, under the Florida Statute Chapter 775, section 021, paragraph 5, it states, "Whoever commits an act that violates a provision of this code or commits a criminal offense defined by another statute and thereby causes the death of, or bodily injury to, an unborn child commits a separate offense if the provision or statute does not otherwise specifically provide a separate offense for such death or injury to an unborn child."[13] While the definition of the unborn is clearly defined in paragraph 5 subsection e, stating that "As used in this subsection, the term "unborn child" means a member of the species Homo sapiens, at any stage of development, who is carried in the womb."[14] Damages caused to the unborn fetus are also covered in Florida Statute Chapter 782, section 09, the laws regulating "killing of unborn child by injury to mother" are laid out.[15]

Specifically, the law states that if the death of a mother results in the death of the child, that the perpetrator would receive a punishment of a similar degree as they would because of the mother's death. So, for instance, if the mother's death resulted from murder in the second degree, the perpetrator would be charged with second degree murder for the mother and again separately for the murder of the fetus.[16] While these laws regulate the behavior of another person against a fetus which results in reprehensible damage or death, they do not mention any regulations against actions taken by the mother. The statute includes an exception on fetal terminations for abortions voluntarily secured by the mother.

Because abortions remain legal on the federal level, this stipulation in the law is necessary to protect those women who decide to undergo the procedure. The protection to fetuses is also extended in Florida Statute Chapter 316, section 193, paragraph 3, subsection 3, C(3)(a)(b), which deals with driving under the

[13] *Fla. Stat.* § 775.021(5).
[14] Id.
[15] *Fla. Stat.* § 782.009.
[16] Id.

influence. That section states that the death of any unborn child that occurs as a result of a driving under the influence fact pattern can be penalized in the following manner:

> a. A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
> b. A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if:
> (I)At the time of the crash, the person knew, or should have known, that the crash occurred; and (II)The person failed to give information and render aid as required by s. 316.062.[17]

For purposes of this subsection, the term "unborn child" has the same meaning as provided in s. 775.021(5). A person who is convicted of DUI manslaughter shall be sentenced to a mandatory minimum term of imprisonment of 4 years[18].

Noting the stipulations presented by the states which protect the mother and her fetus, it is interesting to note the historical application of the law from Florida's Supreme Court. In the 1977 Florida Supreme Court case of *Stern v. Miller,*[19] an automobile accident involving a 7-month pregnant woman resulted in the stillborn delivery of her unborn child due to the negligence of the other party involved. The issue before the court was to determine whether the fetus would have been viable had it not been for the accident and only because of the accident. The court ultimately determined that the fetus did not meet the definition of a "person" under the Wrongful Death Act.[20] This discrepancy in the classification of the status of the fetus was due to statutory interpretation of what constitutes a person, specifically a "minor child." A precedent was established which defined a "minor child" in the 1968 Florida Supreme Court case of *Stokes v. Liberty Mutual Insurance Company,*[21] where a stillborn fetus was considered a "minor child" under the Wrongful Death

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[17] *Fla. Stat.* § 316.193(3)(C)(3)(a)(b).
[18] Id.
[19] *Stern v. Miller*, 348 So. 2d 303 (1977).
[20] *Fla. Stat.* § 768.16.
[21] *Stokes v. Liberty Mutual Insurance Company*, 202 So. 2d 794 (1967).

Act. However, the issue regarding the interpretation of what constituted a "minor child", was replaced by the time *Stern v. Miller* was decided.[22]

While the issue of determining the legal remedies available for harmful actions towards an unborn fetus caused by another person were enumerated, there remained the issue of determining whether it is a criminal offense if the mother terminates her own fetus through means other than an abortion procedure. This very issue was brought before the Florida Supreme Court in the 1997 case of *State of Florida v. Ashley*, where a young woman was charged with a third-degree felony murder and manslaughter for having shot herself through the abdomen, which ultimately resulted in the death of the fetus.[23] The Circuit Court, Pinellas County, dismissed the third-degree felony charges. However, they did not dismiss any manslaughter charges. The Florida Supreme Court's opinion by Justice Overton ultimately decided that "…criminalizing such actions by a pregnant woman raises a number of policy, social, moral, and legal implications. However, under our form of government, the appropriate place for those issues to be resolved is in the legislature. Accordingly, I concur with the majority opinion and defer to the legislature for consideration of this issue."[24]

Essentially, the Supreme Court held that common law immunity of pregnant woman for causing injury or death to their fetus was not abrogated by felony murder, manslaughter, and termination of pregnancy statutes.[25] This case demonstrates the effect of the expanded abortion accessibility, and the effect it has had on the laws regulating the rights of the fetus, as well as the rights of the mother. Considering the case law and statutory modifications in Florida, we can note that the state has imposed its own regulations over a federal standard concerning abortion by creating a distinction in the law where the early termination of a fetus can be punishable by law under certain circumstances.

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[22] Id.
[23] *State of Florida v. Ashley*, 670 So.2d 1087 (1996).
[24] Id.
[25] Id.

**Conclusion**

Overall, we can see that the double standard present in the law governing abortions and fetal rights can be attributed to the divide between federal and state legislatures in regards to regulating abortions. Ever since the Supreme Court's ruling on *Roe v. Wade*, the door was opened for the federal government to allow early term abortions universally across all states, while allowing states to retain some of their power by allowing local stipulations to the federal regulations in the form of fetal rights laws. Ultimately, states need to find a balance with the current federal laws in place and need to maintain their ability to govern abortion and fetal rights as their constituencies see fit.

# Federal Elections Standards for a Malicious Cyberspace

by Michael E. Cairo

*"The right to vote should be considered sacred in our democracy."*
*Charles B. Rangel*

## Introduction

The right to vote is the most defining and important part of a functional democracy. Public faith in voting systems is absolutely crucial to a successful democracy so that citizens have a high degree of confidence that their elected leaders receive affirmative votes in a fair manner by a majority of the respective electorate, ensuring accurate representation in government. There are a plethora of Federal laws, State laws and five separate amendments to the Constitution of the United States that protect citizens' right to vote indiscriminate of race, sex, income and age. The 2016 Presidential election brought to light a new kind of threat to our democracy- malicious cyberattacks from an adversarial foreign government.

Presidential elections in the United States are vulnerable to system breaches by independent hackers or foreign state-sponsored cyber militants. This sobering reality was revealed when the Office of the Director of National Intelligence released a shocking declassified report on a joint investigation conducted by the Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI) and National Security Agency (NSA). All of these agencies asserted with high confidence that the Russian President Vladimir Putin likely ordered an influence campaign with intentions to undermine public faith in the U.S. democratic process in an aim to discredit former Secretary of State Hillary Rodham Clinton's campaign in an attempt to foster support for President Donald Trump's campaign.[1]

[1] Office of the Director of National Intelligence, Assessing Russian Activities and Intentions in Recent US Elections ii, 3, Jan. 6, 2017, https://www.intelligence.senate.gov/sites/default/files/documents/ICA_2017_01.pdf , (last visited April 5, 2017).

The report also stated that Russian intelligence successfully gained access to several local and state voting systems. The declassified report released to the public notes that it purposefully excludes intelligence methods and sources that would fully support these assertions in order to maintain the agencies' ability to collect critical intelligence in the future. These agencies state that Russia is responsible for these malicious activities in reference to Russian propaganda tactics deployed in former Soviet countries and in the United States, activity which supports this narrative.[1] Under the assumption that these allegations are true, the very scenario of any foreign government or any other entity having the ability to hack into our voting systems begs the question about the security of our democracy at large in the 21st century.

Through further examination into the level of vulnerability some states' voting systems, it is evident our democratic process has never been more severely at risk than it is today. 28 percent of voters live in jurisdictions that use Direct-Recording Electronic (DRE) machines to keep track of votes. The issue with this system is that there is no paper trail or other verifiable means that can record the votes cast outside of a susceptible electronic database.[2] Some DRE machines used in the 2016 election still operate on the severely outdated Windows XP operating system, security updates for which were halted in 2013, leaving them very vulnerable to cyber-attacks.[3] The current legal framework neglects to address key questions that need to be asked and answered in the event of a cyberattack on our nation's voting systems. What measures are currently in place to protect the integrity of U.S. elections? What are the national standards that states must comply with in order to ensure that their systems maintain a proper level of security? How can voters independently verify the accuracy of elections if a DRE system is compromised? Robust mandated federal cybersecurity standards must be

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[2] Drew DeSilver, *On Election Day, most voters use electronic or optical-scan ballots*, Pew Research Center (2017), http://www.pewresearch.org/fact-tank/2016/11/08/on-election-day-most-voters-use-electronic-or-optical-scan-ballots/, (last visited Feb 1, 2017).

[3] Shanika Gunaratna, *Cybersecurity expert: One battleground state most vulnerable to voting hacks*, CBSNews.com, 2017, http://www.cbsnews.com/news/ex-nsa-expert-if-i-were-an-election-day-hacker-id-hit-pennsylvania, (last visited Feb 1, 2017).

adopted to secure our voting systems to protect the integrity of U.S. elections and the public faith in the democratic process to maintain strong national security.

**Current Regulation**

The federal government of the United States only has limited power in regulating how elections are conducted; a majority of the power is vested with the States and localities. Art. I, § 2 of the U.S. Constitution provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Art. I, § 4 provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." And Art. I, § 8, clause 18 gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

These provisions grant States and localities to determine the policies surrounding the administration of elections, however it also grants Congress the power to create or amend laws that are "necessary and proper" to ensure that elections are executed appropriately so that our leaders are duly elected. Furthermore, the Help America Vote Act of 2002 (HAVA) established the Elections Assistance Commission (EAC) that provides aid to States and localities in improving the administration of elections, and provides funds to update outdated voting systems and establish a system of testing and certification of each State's voting systems. The provisions in HAVA do not require all states to be compliant with federal testing and regulation.[4] Taking these factors into account with respect to Art. I, § 4, it is apparent that Congress is granted the authority to adopt "necessary and proper" security regulations so long as they do not interfere with the places in which representatives and senators are elected to represent. .

[4] 42 U.S.C. § 15301 (2009).

Before we examine the law surrounding the protection of votes cast in an election, let us first consider the definition of a "legal vote" as decided in Bush v. Gore.[5] This case is one of the most deeply controversial in our election system in recent history because its outcome ultimately decided who would become the President of the United States in the hotly contested 2000 election between then-Governor George W. Bush and former Vice President Al Gore. The validity of the election was called into question when it was discovered that 9,000 votes cast in Miami-Dade County failed to properly detect a vote for President. The Gore campaign was granted a recount because Section 102.168(3)(b), Florida Statutes (2000) provides that a recount could be imposed by a court of law if the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election."[6] Given this interpretation of a legal vote, voting systems must not only tally the results of an election, but they must also clearly indicate the intent of each voter.

**Analysis**

While several provisions in Art. I of the Constitution grants States and localities power to administer and regulate elections as they see fit, Congress does have limited power to create and amend elections regulations as well. Given the recent attacks on our voting systems in the 2016 election, it is urgent and absolutely necessary that Congress establish some kind of federal standard for cybersecurity of voting systems that States and localities must comply with in order to protect the integrity of the process.

According to a study about the voting systems in place during the 2016 election conducted by Pew Research Center, 28 percent of voters live in jurisdictions that only use DRE voting systems.[7] The EAC's

[5] *Bush v. Gore*, 531 U.S. 98 (2000).
[6] Fl. Stat. 102.168(3)(b) (2011).
[7] Drew DeSilver, *On Election Day, most voters use electronic or optical-scan ballots*, Pew Research Center, Nov. 8, 2016, http://www.pewresearch.org/fact-tank/2016/11/08/on-election-day-most-voters-use-electronic-or-optical-scan-ballots/, (last visited Feb 1, 2017).

recommendations for secure voting are non- binding because of the aforementioned provisions of Art. I. In a report released by the EAC, 20 states have no federal requirements for voting standards, 10 require testing to federal standards, 13 require testing by a federally accredited laboratory, and 12 require federal certification.[8] Giving States the power to decide if they will comply with federal testing and security standards defeats the purpose of having federal standards in the first place. Reasonable minimum standards for cybersecurity are necessary in the digital age and should not be mere recommendations if the vulnerability of one state (such as Florida in 2000) could potentially affect the outcome of an entire election. These facts are especially concerning when you consider the aforementioned intelligence report revealing that Russian hackers successfully gained access to voting systems in several U.S. states and localities. An article by CBS News asserts that the FBI had discovered that as many as ten states' systems were probed or breached during this election cycle.[9] U.S. officials currently maintain that the vote counts were not compromised in the 2016 election, however, foreign actors gaining access to our election processes poses a huge threat to the success of our democratic process and could have catastrophic consequences.

States that use DRE systems (such as Pennsylvania) are especially vulnerable when you consider the fact that some of these systems still operate on the severely outdated Windows XP operating system. Windows XP is a favorite among computer hackers because its vulnerabilities are plentiful and well-documented, thus making it relatively easy to hack-- so much so, that the cybersecurity firm Carbon Black's chief security strategist Ben Johnson says if

[8] U.S. Election Assistance Commission, State Requirements and the Federal Voting System Testing and Certification Program, https://www.eac.gov/assets/1/1/State%20Requirements%20and%20the%20Federal%20Voting%20System%20Testing%20and%20Certification%20Program.pdf , (last visited April 5, 2017).

[9] Alan Diaz, *More state election databases hacked than previously thought*, CBSNews.com , Sept. 28, 2016, http://www.cbsnews.com/news/more-state-election-databases-hacked-than-previously-thought/, (last visited Feb 6, 2017).

he was a hacker, he'd target Pennsylvania specifically for that reason.[10]

In the event of a cyberattack on DRE voting systems that destroys or manipulates the vote counts in the machines' computer memory, the lack of verifiable paper ballots makes it impossible to accurately recover "legal votes" as defined in Bush v. Gore because a "clear indication of the intent of the voter" cannot possibly be determined if, for example, a hacker erases the computer's memory and replaces actual vote counts with fraudulent data. If a hacker successfully gained access to Pennsylvania's DRE databases, they could erase all the votes for a candidate stored in the computer's memory and replace it with several million votes for their opponent, for example. In this case, this outcome would be flagged as suspicious and a recount ordered. However on DRE systems, there would be nothing to back up what was initially recorded into the database. Pursuant to Art. I, § 8, cl. 18 of the Constitution, establishment of federal cybersecurity compliance standards are both necessary and proper for carrying into execution federal elections in the digital age, and the existing recommendations provided by the EAC model are no longer sufficient.

In 2016, Congressman Hank Johnson, D-Ga., introduced the Electronic Infrastructure and Security Promotion Act of 2016 (H.R.6073) that would have directed the U.S. Department of Homeland Security (DHS) to:"(1) designate voting systems used in the United States as critical infrastructure; (2) include threats of compromise, disruption, or destruction of voting systems in national planning scenarios; and (3) conduct a campaign to proactively educate local election officials about the designation of voting systems as critical infrastructure and election officials at all levels of government of voting system threats.[11]

The bill would also task the National Institute of Standards and Technology (NIST) to develop transparent and verifiable standards to ensure the

[10] Shanika Gunaratna, *Cybersecurity expert: One battleground state most vulnerable to voting hacks,* CBSNews.com, 2017, http://www.cbsnews.com/news/ex-nsa-expert-if-i-were-an-election-day-hacker-id-hit-pennsylvania, (last visited Feb 1, 2017).

[11] H.R.6073 — 114th Congress (2015-2016).

operational security of voting systems in each state, and it would amend HAVA[12] to require that each state comply with the standards developed by NIST. The bill died in committees under the 114th Congress because some opponents argued that it would create an additional layer of bureaucracy surrounding elections that they deemed unnecessary. At the time, DHS officials stated that they had no evidence of any 'credible threat' of a cyberattack.[13] Given the information about the Russian hacks we have now, additional protection is needed, whether it be designated critical infrastructure status or not. Either H.R. 6073 or similar legislation that establishes more robust cybersecurity standards at a federal level should be adopted in order to ensure the efficacy and protection of each state's' voting systems. Each state could still retain full authority to administer elections as it sees fit pursuant to Art. I, § 4 so long as it meets federal cybersecurity standards.

While this legislative attempt was a step in the right direction, the 115th Congress of the United States seemed to have taken a different approach. As of February 2017, there is legislation on the House floor entitled H.R. 634 - Elections Assistance Commission Termination Act to amend the HAVA to effectively terminate the EAC citing that the commission has outlived its purpose. "If we're looking at reducing the size of government, this is a perfect example of something that can be eliminated," said Rep. Gregg Harper (R-Miss.), the committee chairman, after the bill passed on a 6-3 vote. "We don't need fluff."[14] In a particularly volatile election year where numerous claims of voter fraud and foreign actors hacking into our voting systems, it seems as though some in Congress are considering eliminating the EAC at a time when it appears that it is needed the most.

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[12] The Help America Vote Act of 2002, 42 U.S.C. §15541 (2002).

[13] *Summary of H.R. 6073 (114th): Election Infrastructure and Security Promotion Act of 2016* - GovTrack.us,, https://www.govtrack.us/congress/bills/114/hr6073/summary, (last visited Feb 1, 2017).

[14] Associated Press, *House Committee votes to scrap agency that helps states improve voting systems*, Feb. 7, 2017, http://www.latimes.com/politics/washington/la-na-essential-washington-updates-house-committee-votes-to-scrap-agency-1486514170-htmlstory.html, (last visited April 5, 2017).

**Conclusion**

The need for federal cybersecurity compliance standards for voting systems in the United States is absolutely essential to protect our democracy, and the time to act is now. The current EAC guidelines do respect the autonomy of States and localities in determining policy for executing elections as provided in Art. I of the Constitution. However, they are insufficient given the ever-present threat of data breaches in States that use DRE systems to tally votes. Congress should exercise its power granted in Art. I to impose more robust federal compliance standards to ensure that every state's voting systems are secure and that they maintain a verifiable paper trail that can be used for audit in the event of a cyberattack.[15] If the EAC is to be dismantled, the Department of Homeland Security should administratively add cybersecurity regarding federal elections to their list of sectors of critical infrastructure to ensure optimal protection and efficacy in our democratic process.

Reform is essential if we hope to maintain a properly functioning democracy, to restore a recently shaken public faith in our democratic process, and to deter any attempts by foreign adversaries such as the Russian government from interfering in or undermining confidence in our elections. Foreign influence on our elections could prove to be catastrophic for our national security if adversarial actors can successfully manipulate our election process to favor their own interests. The need for stronger cybersecurity reform to our voting system is critical to the survival of our democracy in the digital age.

[15] U.S. General Accounting Office, *The Scope of Congressional Authority in Election Administration* , March 2001, http://www.gao.gov/new.items/d01470.pdf, (last visited April 5, 2017).

# Fraud Or Fact: Should Speech Be Regulated In Social Media?

by Stefania Cardenas

## Introduction

*"...It's about morality and social conscience, it's about standing up for what's right versus moral laziness, it's about courage versus cowardice."*[1]

The first amendment is the basis of many debates, struggles, and discussion within our everyday life. The concept of our basic freedoms even though specific, tend to be taken in a vague manner allowing for various interpretations from varying perspectives, all of which, lead to the constant debate of our basic rights. Freedom of religion, speech, assembly and to petition the government, construct the basic structure of the first amendment.[2] These rights are guaranteed against the excesses of the government, but what is the extent to which these rights are expressed in current domestic policy?

There are exceptions to every rule, loopholes to every method, and limits to every freedom. The first amendment is no stranger to this. The laws of the United States are designed to protect the safety of the people, albeit limiting the freedoms that were given to us. The rights entrusted to the people are broad but not unlimited. Yet, the advancement of society and its more modern school of thought requires innovative methods in order to uphold the rights the justice system claims to protect. With the rise of social media, the internet, and technology, our consumption of technology has affected our personal lives, from the way we operate our business that support our livelihood, to our main stream form of communication, which brings us to the issue at hand. With social media becoming our primary source of information, should freedom of speech and expression include the protection against purposeful dishonesty and deceit for online publishing?

Fraudulent news stories are a current issue, recently noticed by the growing

[1] Arun D. Ellis, *Daydream Believers Corpalism II* , Amazon Publishers (2014).
[2] U.S. Const. Amendment I.

number of fake stories exposed by the press. Due to the exploitation and growing problem with fake news, Google was the first to take a stand against the websites with deceptive news stories. Facebook followed, by banning the advertisement from these websites on the Facebook page. However, legal stops have not been yet created for false news outlets. Because of the great population and ease of online publication, it is not just journalist who will be publishing stories online, but anyone with a will and access can publish a piece to be taken as a news story. This ease of access is what brings the problem of created stories being published as real news stories online to our public awareness.

Fabricated stories are not just a problem online, but also on popular news channels. In 2000, in the case of *New World Communications of Tampa, Inc. v. Jane Akre*,[3] a Tampa Bay Fox affiliate faced charges for wrongful termination of two employees who had refused to publish a story they knew to be fake. The principal issue at hand occurs when a story might be tainted with false information yet appear and claim to be realistic. These fake news stories are where the main problem lies and whether the protections given under the First Amendment's protected speech regulations should be allowed.

This raises the ultimate question: how far does the protection go? As far as the law is concerned, this protection is limited up to the point that does harm to the public. An example is defamation, or libel. Per the law, this is a part of unprotected speech under the first amendment for it is harmful to the character of the victim. Yet, fabricated news are protected under the first amendment, although they might be harming people's reputations with the stories they say are true. However, as the case above suggests, should it not be considered a contradiction of our laws and fundamentally, a detriment to the primary goal of protecting the people?

**The Canon of Journalism**

We can begin by looking at what the public would believe and expect to be true. Like any other profession, journalists are guided by ethical standards that

[3] *New World Commuications of Tampa, Inc. v. Akre*, 866 So. 2d 1231 (Fla. Dist. Ct. App. 2003), as clarified on reh'g (Feb. 25, 2004).

must be followed, otherwise, consequences can be expected. As for journalists, the code of ethics, otherwise known as the canons of journalism, is the guideline for which they should aspire to follow. It is comprised of six codes: responsibility to the public welfare, freedom of the press is to be guarded, independence from all obligations that might affect truth bearing to the people, sincerity by being truthful and accurate, impartiality to be free from any bias and fair play to not publish accusations that will harm moral character without the chance of the accused being heard.[4]

According to the Society of Professional Journalism, the main focus of journalists is to "seek truth and report it."[5] The accuracy of their work is essential. It must be verified and great care should be taken in ensuring that information is not misrepresented. Sources need to be presented clearly and biases must be vetted. Throughout a developing story's progression, journalists should make sure that updates and corrections are made promptly. Furthermore, part of the responsibilities of journalists is to give "voice to the voiceless." Journalists must be guardians of the press and wary of government interference in order to present the truth to the people. They must never distort information, including reenactments and visual aids. The journalistic community is dependent on clarity, fairness and transparency. To expose others who might be acting unethically in journalism, even within their own organizations is part of their code of ethics. Journalists should take responsibility for their work and the information they provide. They must remember the gravity of their work and ensure that it is of the highest quality.

By analyzing the journalists' code of ethics, it is obvious that the reporting of truthful stories is where the main objective lies. Despite the truth being expected professionally as well as publicly, the truth is not what usually will help a journalist's career. Many journalists, although they may tell the truth and report stories accurately, cannot find the 'big story' that will help boost their career. One impactful story could be the stepping stone of their career

[4] *Code of Ethics or Canons of Journalism* (1923), Ethics code collection (2011), http://ethics.iit.edu/ecodes/nodes/4457 (last visited Feb 6, 2017).
[5] *SPJ Code of Ethics*, Society of Professional Journalists, Improving and protecting journalism since 1909, Spj.org (2017), http://www.spj.org/ethicscode.asp, (last visited Jan 30, 2017).

and journalists always seek the career changing story that will bring them fame.

Nevertheless, with events that happen on an everyday basis, people are no longer interested in the mundane stories of everyday lives. The public continues to search for more and more extraordinary stories. It causes writers to exaggerate the stories and truth into more interesting forms in order to gain attention and a reoccurring audience.

As for the journalists who choose to take such actions, exaggerating stories and distorting the truth, protection is given by the first amendment and the freedom of expression. The freedom of expression ensures that the public is permitted to represent their ideas and opinions without interference from the government. The topic or essence of the literature is to not be intercepted no matter how wrong it may be. Unfortunately for the masses, it does not protect them against false media and print.

Precedence supporting fake news may have been established in the *New World Communications of Tampa Inc. v. Jane Akre*.[6] The case involved two employees who were fired for their refusal to run a story they knew to be false. However, Fox News still wanted to publicize the story, ultimately leading to the termination of the employees who threatened to go to the FCC. The employees' claim was based on the whistleblower law which allowed them to sue for wrongful termination. Fox fought to prove that the whistleblower laws did not apply, since they did not break any laws, due to the fact that the employees were not reporting anything of importance that could be protected.[7] The court decided that Fox News' actions were protected under the First Amendment rights stated in the Constitution. The FCC policy against falsification was considered a policy only, not a law, rule or regulation.

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[6] *New World Communications Of Tampa, Inc*., d/b/a WTVT-TV, *Appellant, v. Jane AKRE,* Appellee, No. 2D01-529 Dist. Crt. Of Appeals of Fla, 2nd District, February 14, 2003, http://caselaw.findlaw.com/fl-district-court-of-appeal/1310807.html, (last visited April 10, 2017.).

[7] Jane Akre and Steve Wilson, *Modern Media's Environmental Coverage: What We Don't Know Can Hurt Us*, 33 Boston College Environmental Affairs Law Review 551 (2006), http://lawdigitalcommons.bc.edu/ealr/vol33/iss3/4/, (last visited April 10, 2017).

Despite the outcome of the appeal, the core dilemma that brought this case all the way to the Supreme Court was the question of the First Amendment rights when publishing inaccurate information in their news station.[8]

However, the public was still not satisfied that although what they were doing what was classified as constitutionally legal, it seemed completely immoral and wrong. It was found that exaggerating the truth or even making up parts of a story did not fall into the illegal categories of the freedom of speech within journalistic parameters.

**Publisher v. Distributor**

Based on common law, a publisher is liable for any defamatory statement that may have been created by another journalist. However, distributors are not liable for materials they distribute however defamatory they may be. With the beginning of the internet boom, courts were faced with a new structure to deal with and the distribution of liability as well. In a 1991 case, *Cubby, Inc. v. CompuServe, Inc*.,[9] the company provided their subscribers with access to 150 forums run by third party members. One of the forums was Cameron Communications which focused on the journalism industry and promised to control content, "in accordance with editorial and technical standards and conventions of style as established by CompuServe."[10] CompuServe only provided the access to the forum but had no filters established for the documents the forum presented. Therefore, the court identified CompuServe as a distributor rather than publisher and dismissed their liability.

However, in the 1995 case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[11] an unknown user posted comments on the Prodigy Services Co. bulletin board claiming criminal activity by Stratton Oakmont and its president. Stratton Oakton brought suit against Prodigy Services Co. for defamation. Similarly to CompuServe, Prodigy Services Co. was a forum that

[8] *Fox News wins in court*, Daily Kos (2007), http://www.dailykos.com/story/2007/7/31/364678/- (last visited Jan 24, 2017).
[9] 776 F. Supp. 135 (S.D.N.Y. 1991).
[10] Id.
[11] 1995 WL 323710 (N.Y. Sup. Ct. 1995).

allowed third parties to publish documents on the site. The sole difference between the sites was the set of guidelines and screenings that the site had established in order to avoid offensive and defamatory material. Due to the site's attempts at restricting illegal documents, the court ruled the site to be considered a publisher rather than a distributor. The end result consequently led to the belief that any effort to try to restrict material faced a higher risk of liability than they would have if they had not tried at all.[12]

Following the outcome of both these cases, the courts agreed that a system needed to be in place in order to deal with this new issue that emerged as a result of the new technology. The Communications Decency Act[13] was established in 1996 to prevent further issues with the conflicting realities and values emerging as a result of a new technology. The Act declared that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." [14] The interactive computer service was defined as any information service, system or access software provider that provides access by multiple users. The establishment of the Computer Decency Act of 1996 allowed internet publishers to be treated differently from publishers in print, television and radio when it comes to liability issues. However, this did not immunize the actual creator of the defamatory document from liability when using the online service, which is a conclusion widely ignored by the public.

**Democracy and the Real Freedom to Choose**

With the new era of social media, information is sought after within online postings rather than the original form of news sources such as newspapers and television. Due to the ease of online postings and paired with the feeble enforcement of violations within the internet, fake news stories have become a growing trend that is affecting the entire world. According to a recent survey

[12] *Immunity for Online Publishers Under the Communications Decency Act*, Digital Media Law Project, Dmlp.org (2017), http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act (last visited Feb 6, 2017).
[13] § 230. Protection for private blocking and screening of offensive material, 47 U.S.C.A. § 230 (West) 1996.
[14] Id.

by Buzz Feed, it has been found that fake news stories are becoming more popular than real ones.[15]

During the past election, a significant amount of fake news stories were published about the candidates and other influential persons. Fake clickbait headlines hooked more users more often than real stories did. The investigation compared fake news hoax sites and hyper-partisan blogs to legitimate news articles from nineteen major news outlets. News title such as "WikiLeaks confirms Hillary sold weapons to ISIS" or "Hillary is disqualified from holding any Federal office" and " Pope Francis shocks the world, endorses Donald Trump for president," were examples of fake news stories that were purposely created to fool the people into swaying opinions about the candidates. [16]

In a CBS news story, their research revealed that of the top twenty fake news stories, all but three were Pro-Trump or Anti-Clinton and those stories were selected more than 8.7 million times. On the other hand, of the top twenty real news stories, pros and cons of each candidate were found but were selected by readers less than 7.4 million times. There was a difference of at least 1. 3 million readers that was recorded between the popularity of fake news stories and real news stories.[17]

The greatest trouble about the numerous fake stories found was they were all capable of swaying the public's opinion and perceptions about the candidates thus significantly changing the course of the campaign and presidential race. Stories that taint the reputation of the candidates or even lead the people to believe that a person might be engaged in illegal activities or even disqualified from the race, are headliners that can truly affect the perception of reality for

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[15] Craig Silverman and Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BuzzFeedNews, Dec. 16, 2016, https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm_term=.gx3q7MM33#.jg3nABBPP, (last visited April 10, 2017).

[16] Id.

[17] *Probe reveals stunning stats about fake election headlines on Facebook*, CBSnews.com (Nov. 17 2017), http://www.cbsnews.com/news/facebook-fake-election-news-more-popular-than-real-news-buzzfeed-investigation/ (last visited Jan 30, 2017).

the public therefore taking away any real chance of choosing a candidate since the people are misinformed. Being compelled and tricked into choosing a candidate versus being correctly informed and choosing a candidate after predetermined consideration are two entirely different systems. By being misinformed, it is not just unethical and unjust, but since media outlets are trusted to inform us of the truth, by intentionally lying to us, they are trying to control us and deny our right to choose and vote soberly. Although this is not the only example in which fake news can affect the public, it is the most recent example of the influence that this new trend can have.

Facebook and Google were both under fire for the widely-shared news stories that spread false information about the candidates. Google established a new policy in which they would withhold lucrative digital ads from appearing on any sites that "misinterpret, misstate or conceal information." One example was the top search results for the phrases "final election results" or "who won the popular vote," which directed all to a fake news blog named "70news" that falsely claimed Trump won the popular vote by over 700,000 votes. Google's new policy of withholding these acts gives news and information sites greater incentives to avoid false headlines or risk losing revenue by not having their pages banned from being advertised.[18]

In a CBS survey, sixty-six percent of Facebook users get their news from Facebook stories and forty-four percent of Americans read or watch news solely on Facebook. Yet during an interview, Mark Zuckerberg, CEO of Facebook, was intent on denying the idea of the fake news being able to affect the public opinion. Still, a few weeks later, it was confirmed that Facebook followed Google's example in keeping advertising dollars away from fake news sites. The only loophole found for these sites is the audience network policy, which does not take part in the ban, therefore shared content on a person's own news feed is not covered and permitted to be advertised.

[18] *Facebook, Google announce new policies to fight fake news,* CBSnews.com (2017), http://www.cbsnews.com/news/facebook-google-try-to-fight-fake-news/ (last visited Feb 7, 2017).

**Human Rights v. Ethics**

The main problem the public and the legal system faces is whether fake news that appears to be real should be protected under the First Amendment. Ethically, the public believes the answer to be no, yet legally under the commercial speech protections, the answer tends to be yes. Fake news has been present for longer than most of us realize, but it was only recently that the problem has risen to this magnitude.

As of yet, no international court has considered the legitimacy of news provisions under international law. A statement by the United Nation concerned with the human rights make it clear that false news provisions are inconsistent with the guarantee of freedom of expression especially if the allegations of false news are pursued under criminal law. Establishing a law only to prohibit the dissemination of false news creates the threat of public unrest. In 2000, UN Special Rapporteur held a press conference denouncing laws that result in imprisonment solely based on false news provisions. For example, a case might arise in which a journalist reports a developing story. The originally stated facts are later proved to be untrue, hence creating a false information allegation. In a case like this, prison terms for publishing or broadcasting false information is overbroad and in some cases, both reprehensible and out of proportion.

Moreover, according to Article 19, a charity registered in England and Wales, writing the goal into law may present unacceptable dangers.[19] Examples from this organization include the effect on rapidly developing stories, telling the difference between facts and opinions, recognizing what the truth is on a particular matter and the potential for abuse. The fundamental point that the author was attempting to make was that in situations where the journalist cannot assure the public that the story is completely valid, it is not just for a person to be persecuted for those actions. The journalist may have the best intentions in providing a story that is up to date and current and in that process, fact-checking may be skipped or even unavailable. The dangers

[19] *False news*, Article 19 ( a 2017 Registered charity number 327421 (registered in England and Wales), https://www.article19.org/pages/en/false-news.html, (last visited Feb 2, 2017).

presented above should be considered when deciding whether or not to make the publication of fake news criminally actionable.

The dangers presented result in the journalists being victims. Many times, the mistakes are made by good people trying to do their best job and in the process they get caught up in the legal nonsense and end up culpable for no good reason. Imprisoning journalists for mistaken reporting presents as a true human rights violation and an extreme argument for not prosecuting mistaken reporting. The argument that is not truly being considered is the side of a journalist who takes advantage of the freedoms given, the side that involves malice, which can truly make a person culpable for their action. Similarly to a criminal case, in order to avoid a human rights violation, a requirement of intent or motive must be present in order to be guilty of a crime when false information is involved.

As the organization, Article 19, suggests, false news does not meet the requirements needed under the limitations placed on the freedom of expressions. The first part of the limitations under consideration by the U.N. Human Rights Commission requires that it must be provided by law in sufficient clear terms to make it foreseeable as to whether or not statements are permissible.[20] The necessity for these statements to be specific makes it impossible for a law to be written that will predict false news that should be negated. This is a great challenge that must be overcome before writing the goal into law.

Of concern also, is the law that protects internet publishing sites by the Communication Decency Act of 1996 because it is outdated and requires change. We cannot allow for the use of the internet to continue harming others due to fear of liability. As a government created for the people, we must seek to protect the public in every manner possible. Changes to be made include revising laws that, although they may have functioned properly in the past, are currently failing to support the welfare of the public.

[20] *Limitations*, Article 19, (2017), https://www.article19.org/pages/en/limitations.html (last visited Feb 2, 2017).

**Conclusion**

Although ethically journalists should strive to be truthful at every turn, with the reality of our constantly changing world, innovative laws need to be created to keep up with the contemporary issues. A re-occurring problem within the online publishing community is the growth of fraudulent stories written and published online. Deceptive stories made a significant impact during the recent political election, thereby demonstrating the true power the press holds in swaying public opinion. Millions of people get their information through social media sources, which can be tainted by unprofessionalism.

It was previously tested and proven through court cases, that the protection of free speech was guaranteed even for false stories created by the press. The case involving Fox News was a clear example of the abuse permitted by the law. Ethically, this is a standard that must be revised for it affects the public and the expectations and the trust we place in the media.

Understandably, there are many opposing the writing of these goals into laws. Extremists' views and results are depicted demonstrating the worst possible outcome as the only possible consequence to this law being enacted.

In order to avoid this grave miscarriage of justice, a motive behind the action should be investigated and incorporated into the contemporary legal design against fabricated news accounts. Taking this action will allow for mistakes to be avoided in the future and innocent people to not be affected and unjustly criminalized for a misunderstanding or error. Laws need to be updated in order to stay current, thus a change in limitations for freedom of expression and the protections within the Communication Decency Act are overdue.

With the rise of technology and communication via social media, we have grown to seek and depend on sites such as Facebook to obtain our daily news information. Protected by the first amendment, publishers allow the creation of fraudulent news stories that are published all over sites to gain attention or mislead readers. A goal to end this ethical violation, faces various challenges when considered being acted upon and written into law. However, if we take special consideration and write the law carefully, we should be able to find a way in which we are capable of stopping this unethical allowance while making sure innocent people do not suffer a harsh injustice.

Since the establishment of the U.S. Constitution, our country has been successful in providing a legal system that successfully strives to act to protect the people from any injustices that may have been created. Although change has been slow to occur, with the rapid advancement of technology and lifestyle changes that come with it, we are currently being pushed to update our lives to match the newest technologies. There are no excuses or loopholes for resisting change. In order to advance, adaptation is necessary. It is also true that in order to protect our way of life, the law must also adapt

# Intellectual Property: A Tool for Innovation and Change: How Do We Maximize Its Effectiveness?

by Michael Dewing

The road to innovation can be a collaborative ideal, sharing insights, open access, research in vital areas and includes an economic generator that identifies foundational principles, constitutional ideals, ethics, and a system of management that embraces principles of democracy. Freedom of innovation promotes ideas, generates commerce, and enables the development of share values. How can we best protect our emerging ideas and business investment opportunities to plan for a future where principles are supported by an international body, and where our judicial, legislative, and executive procedures that help citizens regenerate our middleclass value system? American public policy will be challenged to define a new business landscape for intellectual property in the 21st century.

Statesmen have an ethical duty to preserve our ideals, founding principles, and economic stability so that our country can compete as champions of innovation, thereby instilling a sense of hope and promise in our shared democracy. The desire to exploit our creative ideas is complex, it is affected by heavy regulation and is both a statement of our intrinsic values identified early in the intellectual property system development to seek reward for our efforts, and a construct of oppressive behaviors indicating a preference toward corporate needs, consumerism, and the apocalyptic political war machine encroaching on the very rights it endeavors to protect.

Our system needs an overhaul, a tune up, a realignment of foundational principles and the balance of power. The economic generator of growth potential in this country starts with, "We the People." Our system needs to be reviewed in light of economics, enabling innovations, and foundational principles of fairness and justice. Above all things, the system should be reviewed to eliminate bias and preference.

Like any issue, we must view both sides of any argument concerning the public policy efforts to enhance our innovation system, and consider possible

results in relation to surrounding issues that have and will affect people. Law is an ocean; fluid and changing, serving as a challenge to our competing moral values through the creation of the rule of law. In order to promote fair and equitable competition in our capitalistic society, the rule of law must consider both the future economic benefit of issues like investment, taxation and prevention of monopolies, and public policies that hopefully, will address a vision for the greater good of mankind, not only in this country but with our global partners as well.

That is the challenge of all three branches of our government, to find the balance among competing values, to promote justice, fairness, and at the same time, enable innovation. An effective strategy to accomplish those objectives has been to promote access to knowledge, employ a system that allows innovators to profit from their efforts, and to offer protection for those established property rights. The system itself has experienced multiple changes in process and procedure to identify innovations and innovators, and then those innovations are promoted through a shared global infrastructure on social platforms, which then engineers and inspires additional growth in creativity.

The impact of an enabling framework that produces innovative trends that can accelerate well beyond what any regulatory body contemplates will also affect access to the public domain, property rights and most importantly, the intellectual curiosity and courage to innovate. The federal government may be somewhat handicapped by its ties to vested interest groups and lobbyists, and appears to be stifling the process. The imagery used to promote a system of intellectual property is attributed to promoting the growth of technology with greater global economic outcomes, but could it be that the reality is a class of people holding power with unrelenting force and political maneuvering?

**America Invents Act**

Thomas Jefferson, U.S. President, was quoted as saying, “He who receives an idea from me, receives instruction himself without lessening mine; as he who

lights his taper at mine, receives light without darkening me."[1] Innovation, like the light Jefferson referenced, is a managed resource. It flourishes or dies in a system that can be manipulated to control and profit from ideas created by the human mind. The America Invents Act[2] represents an effort to achieve patent reforms. However, included in the reforms is a change in a fundamental right and standard; a change for innovators from the first to invent to the first to file. Since inventors must have a working model of their invention, it seems obvious that someone with more resources could make a model first and beat the true inventor to the patent office. Keeping the playing field level so that all inventors could have access to the patent system appears to have been a key component in the U.S. innovation cycle. Today, in 2017, it seems that people have been diverted intellectually, by a theory of leadership that holds stock in the value of a corporate model. Yielding to the needs of and showing preferences for corporate ideology, which has effectively presented independent inventors with additional barriers to entry of the Patent system.

**Innovation and Motive**

An argument for reasons why intellectual property rights may need to be viewed in a more positive light include insights from the U.S. Chamber of Commerce, "Intellectual property (IP) contributes enormously to our national and state economies. (Many) industries across our economy rely on the adequate enforcement of their patents, trademarks, and copyrights, while consumers use IP to ensure they are purchasing safe, guaranteed products." [3] It's an argument that makes good sense. Intellectual property rights contribute

[1] Miranda Dobson, *Oxford University Press's Academic Insights for the Thinking World*, Nov. 11, 2014 ; https://blog.oup.com/2014/11/intellectual-property-law-cases/, (last visited March 14, 2017).

[2] America Invents Act, September 2011; https://www.uspto.gov/aia_implementation/bills-112hr1249enr.pdf; (last visited March 26, 2017).

[3] *Why are Intellectual Property Rights Important?*, Global Intellectual Property Center, U.S. Chamber of Commerce, 12/28/2009 , http://www.theglobalipcenter.com/why-are-intellectual-property-rights-important/; (last visited Jan. 17, 2017).

value to our economy through the application of knowledge with our ability to innovate.

Who will be making the innovations of the 21st century? What are the focus areas for innovation, in other words, what are the priorities? Recent changes in politics, geographical boundary issues, and fiscal realities have made the questions profound. World population is expanding, resources are not being used efficiently, we have climate change issues, technologies are shifting rapidly, and many conflicts in political issues related to the balance on trade, and world banking are all factors affecting innovations. We can support the framework of innovation by updating our understanding of the effects of rulings, and how they may be impacting the business models generating the overall economy. Our system of government can invest through public policy initiatives in areas geared for helpful research, in medicines, bioengineering, environmental studies, sustainable development and community planning, food sourcing and agricultural issues, fuels science, transportation systems, solar, and more.

These are examples of things that directly affect the quality of life for human beings, now and in the future. To help encourage innovations in these vital areas we use a system of legal protections to generate an economic benefit. Policy makers therefore, must balance an approach to generate a greater market share for innovation, put in failsafe measures, and define the fairness in open source equitable exchange, so that research in principled areas vital to society can be shared, funded, and supported by the regulatory body if so involved.

**An Open Access Example: Worldwide Brain-Mapping**

The United States is participating in the International Brain Initiative launched by the United Nations' General Assembly in New York City.[4] U.S. researchers also held a separate, but concurrent, meeting hosted by the US National Science Foundation at Rockefeller University to discuss which aspects of the

[4] Sara Reardon, *Worldwide Brain-Mapping Project Sparks Excitement--and Concern*, September 22, 2016, https://www.scientificamerican.com/article/worldwide-brain-mapping-project-sparks-excitement-and-concern/ , (last visited March 14, 2017).

program already in existence could be aligned under the global initiative. Scientists cheered the idea of a virtual, cloud-based data-sharing resource, analogous to the GenBank genomics resource, but raised concerns about the focus of the research and of data collection management issues. Overall, scientists are hopeful that this new global initiative will enable them to take brain mapping to the next level.[5]

The brain mapping project is an excellent example of collaboration and the free-flow of ideas and experimentation. Particularly in some areas, if we do not share information more readily moving forward in the quest for developing our technologies, the alternative might be a stagnation of innovation.

America has been a model of economic growth for the world. But we are experiencing significant changes in our world markets and technologies. There are those that want to keep the status quo and keep populations swimming in ignorance, fussing about protections through legal wrangling. But there are others across the world that are growing their cultures in engineering, technology, agriculture, logistics, monetary applications and so much more. They are working with simple tools and products, increasing their educational knowledge, and performing research, building the GDP of their nations. People from many backgrounds, merging their resources, their energy, and a collective spirit of patriotic ideals with each one immersed in rich cultural tradition, trade, education, commerce and a coherent voice at the United Nations. Ideas, good ones, are meant to be explored, cultivated, and manufactured for the benefit of the public and perhaps generate an economy at the same time.

**The Importance of Innovation**

From an article published by the Global Intellectual Property Center,[6] we

[5] Id.

[6] *Why are Intellectual Property Rights Important*, Global Intellectual Property Center, U.S. Chamber of Commerce, Dec. 28, 2009; http://www.theglobalipcenter.com/why-are-intellectual-property-rights-important/; (last visited Jan. 17, 2017).

have the following facts:

- IP-intensive industries employ over 55 million Americans and hundreds of millions of people worldwide
- America's IP is worth $5.8 trillion, more than the nominal GDP of any other country in the world
- IP accounts for74% of all U.S. exports- which amounts to nearly $1 trillion
- The direct and indirect economic impacts of innovation are overwhelming, accounting for more than 40% of U.S. economic growth and employment
- Nearly all of the 300 products on the World Health Organization's Essential Drug List, which are critical to saving or improving people's lives around the globe, came from the R&D-intensive pharmaceutical industry that depends on patent protections
- Innovative agricultural companies are creating new products to help farmers produce more and better products for the world's hungry while reducing the environmental impact of agriculture
- IP-driven discoveries in alternative energy and green technologies will help improve energy security and address climate change

These facts indicate the important role that intellectual property is playing with the U.S. economy and standard of living, as well as the global community.

**A Flexible Model**

A capitalistic society needs a variety of intellectual assets and viewpoints to pioneer a future of prosperity in human capital. A more equitable and shared process of those values with our world partners may well improve relations and commerce, and in that way, our efforts to lead in a world on the frontier of discovery, could open up a new dimension in generations young and old, merging the intangible ideals of peace and prosperity perhaps? We need flexibility in our ideas, much like our ideals and laws to enforce them. Flexibility is key and is absolutely necessary for shifting the paradigm of entrepreneurial success.

The moment law makers catch on that a whole new innovative way of drafting and implementing a flexible legal theory can help ease tensions between the way we did things and the demands of a new world order, they can actually move to a mutually beneficial outcome, thereby successfully implementing an innovative growth period in our entire process. There would be no more wasted resources, just a simple disciplined approach to evaluating conflicts and solving issues. We're wasting time, valuable resources, taxpayer dollars, and innovation has been squandered or lost completely while bureaucrats, investment tycoons, politicos and lobbyist are profiting at the expense of American society.

For instance, filing for a patent with the aid of an attorney, can cost from $19,930.00 to $22,880 depending upon its complexity.[7] This does not include the costs of producing a working model which is required by the application process. Time is also a factor; it is not uncommon for a patent application to be pending for three years.

The result is the obesity of big box theory capitalism and a shift away from the middle class. The middle class has historically been attributed as being our innovators, some of our greatest innovations have been developed in the innovator's garage.[8] Most of our great innovations came from the innovator's perception of a problem and an informal effort to solve the problem. These did not occur in research and development labs of large corporations. We can estimate that some form of training or trade skill was present and was leveraged by the intellectual property system to extract value from their efforts and to contribute to the innovation cycle and our economy. More input equals more resources for greater benefit, prioritizing the needs of citizens, not corporate expansion which represents a system of collapse under the weight of finite resources. People are what matter. They perceive the problems and can be enabled to solve the problems.

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[7] Gene Quinn, *The Cost of Obtaining a Patent in the U.S.*, IP Watchdog. April 4, 2015; http://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us/id=56485/; (last visited March 26, 2017).

[8] Jennie Cohen, *Great American Garage Entrepreneurs*, (2011), http://www.history.com/news/great-american-garage-entrepreneurs; (last visited March 26, 2017).

Building that model to strengthen the rationale of innovative policy may be the most important aspiration we can hope for in our leadership. Our society, our trade partners, and our planet are all depending on the rationale of a middleclass value system to generate an economic solution to a salvation of resources, sustainable growth, and progressive contribution. Threats to the U.S. innovation cycle includes separating individuals from their rights by giving those rights to employers, increasing the number of monopolies, competition from international sources, challenges to the rule of law, and complexities facing the global population.

**The Innovation Initiative**

Innovation is our future. The concepts of intellectual property and its protections come from many viewpoints. One idea can help and promote societal benefit, or be corralled into isolation and disseminated incrementally for profit. Hopefully, one day promoting societal benefit becomes a trend in the way ideas are encouraged and promoted without the "need" for compensation, but for recognition of our contribution. The tensions exist between the political controls, legal manipulation, business growth and ensuing competition, and with leveraging and insertion strategies into markets both domestic and international. These tensions have invited an opportunity for corruption and mismanagement of legal and ethical mores.

Today, there is much greater competition from the international community, particularly in the quest for resources, labor, land and technology.[9] Threats to the U.S. innovation cycle include separating individuals from their rights by giving those rights to employers, increasing the number of monopolies, competition from international sources, challenges to the rule of law, and complexities facing the global population.

The conceptual gifts and imagination of human beings is remarkable, astounding, prolific, and endearing, but we are flawed, imperfect, easily influenced, and controlled by our sense of need and the level of our own

[9] *Our Common Future, Chapter 11: Peace, Security, Development and the Environment*, U.N. Documents on Gathering a Body of Global Agreements, undated, http://www.un-documents.net/ocf-11.htm, (last visited March 26, 2017).

programming. People are complicated and easily confused, and there is an exploitation of that confusion, whereby the insatiable quest for power is equated with the reward of assets, be that in cash, cash equivalents, or from intangible rights. The current reality is a self-rewarding system of hopeless greed and we are all being ruled by that measure. We the people, the innovators, need a system to keep our greed in check.

**Brighter Days Ahead**

As a great society where people are enabled to be innovative, a system that represents the values of fairness, justice, and a level competitive playing field is needed. We think, we dream, we inspire, and we grow. This can be our American ideal in the future of innovation, our legacy and our reality, a functional and relevant world where people work together to achieve common goals. That's true innovation. To achieve that objective, we may need to draft new legislation, administrative rules, and craft new strategies to enable innovation. In order to achieve the maximum benefit, the emphasis must be on enabling all Americans to be innovators which means we may have to make adjustments to our current system that gets in the way of the public polices of enabling the masses.

As one example of a needed adjustment, we may have to replace the lobby mechanisms that have corrupted the growth of our democracy. Encouragement is key and promoting innovative ideas from people is the future, we need everybody onboard. The system needs to be a collaboration for societal contribution, business development, and social justice with impact investment possibilities and the long reaching implications for building and strengthening our international relations, while at the same time we eliminate the need for excessive transaction costs.

Consider one aspect for innovation of the immediate future: a change in the rule of law, creating contracts and agreements between people of all nations that may simplify a now overwhelmingly complicated process of intellectual property laws, application processes, enforcement challenges, and contract realities. A significant level of expertise is required to navigate the complexity in regulatory requirements.

**Terms of Use**

When we speak in terms of how to approach the issues from a legal perspective, we need to consider the historical events leading up to the identification of intellectual property rights and the public policy purpose for creating those rights. In an article published by the National Paralegal College, we have this account:

> "When the colonies secured independence from England, each colony (except Delaware) passed its own copyright law. Further, prior to the enacting of the United States Constitution, each of the 13 original colonies had its own distinct body of patent law. This, of course, led to a severe degradation in the value of copyrights and patents. What good would a New Jersey patent be, for example, if it would be unenforceable in neighboring New York? In order to rectify this problem, to reward innovation and to greatly facilitate commerce among the states, the drafters of the Constitution felt that intellectual property law should be within the province of the federal (national) government, not the state governments. Therefore, the framers of the Constitution included the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," U.S. Const. Art. I, Sec. 8." [10]

It is also important to remember that intellectual property rights were understood to be a personal property right. As expressed in the article entitled "History and Sources of Intellectual Property Law,"

> "The utility and labor desert theories remain the two most prominent in the Anglo-American tradition.... the meaning of the labor desert theory and conclude that this theory has merit and that a copyright or patent is a vindication of the intimate connection between an

[10] *History and Sources of Intellectual Property Law*, National Juris University, 2006-2017; http://nationalparalegal.edu/public_documents/courseware_asp_files/patents/IntroIP/History.asp; (last visited Jan. 17, 2017).

> individual and the fruits of her labor. The worker deserves credit and a fitting reward for her creative project and the most fitting reward is assignment of a property right so long as that assignment does not impair the intellectual commons for future creators. As a result, a 'copyright' is a natural right, predicated on something far more secure than the norm of social efficiency. This natural rights perspective should not be discounted when intellectual property rights policy is being formulated in order to ensure fairness. Also shown that a 'natural' property right is by no means absolute since it must be balanced against other rights such as the right to an unimpaired common. According to this prescient judgment in Wheaton v. Peters (1834), that every man is entitled to the fruits of his own labor must be admitted; but he can enjoy them only under the rules of property which regulate society, and which defines the rights of things in general."[11]

So from the very beginning of U.S. history, the rights to the creative, innovative efforts of the individual were intended to be property rights of that creative, innovative individual. This is a foundational principle and one that is seriously challenged by the "shop right' and "work-mad-for-hire" legal doctrines that permeate our current system where the rights of the individual creator are ignored and given instead to their employer.

**Balance the System**

When we define rights, or anything for purposeful use for our societal growth and maturity, we may have to look back on the foundations of equality to best understand the distributive effect. How we balance the future of innovation with doctrines, policies, and regulations will define a shared rights platform. We have a limited view using statistical analysis of the effects of access and exclusion. But with enabling legislation, courts can be encouraged to think of innovation as a human right which can be confirmed by looking at public

[11] Richard Spinello, *The future of intellectual property, Ethics and Information Technology*, Kluwer Academic Publishers, 2003; richard.spinello@bc.edu, (last visited Jan. 20, 2017).

interest within the context of our justice system. We need to incentivize people as innovators, reward them and give them fair rights for creative ideas.

These principles are foundational to great leadership and necessary for consistency with our moral principles. Our human nature will demand that we act in our own best self-interest. That is a survival skill and it emerges in our dealings and negotiations to acquire needs or the perception of satisfaction. Our expanding world view requires us to expand our understanding of systems to a broader community, especially our sense of ethical values, of shared values with other cultures, which can be a conduit to multiple forms of trade, and also our mutual understanding of how we might share intellectual property for profit and benefit of the people we are trying to serve. Intellectualism and "enlightenment" should have a place at the table so that monopolistic dreams of power and wealth do not dominate.

Other relevant factors include education, politics, belief systems, morals, and career choices. Education is the top choice, because this demonstrates the access to knowledge or the perceptions of how society will disseminate information. In recent years, the U.S. function in the world as a producer of tangible goods has been delegated. We are losing market share through a lack of growth in the technology sector related to manufacturing because we have delegated this function to other parts of the globe. According to a recent CNN Report, the U.S. has lost 5 million manufacturing jobs since 2000.[12] Other countries are producing engineers, people that actually work directly with products, resources, and ideas. They are emerging on the global landscape with their innovations, and the progressive identification of best processes has been lost to us because of this transfer of function.

So how do we resolve the problem of American participation in a global economic system? We have to address the issues related to the transfer of manufacturing functions to other countries. It may be because of the issue of costs; costs to acquire copyrights/patents or production costs that affect

[12] Heather Long, *U.S. has lost 5 million manufacturing jobs since 2000*, CNN Money, March 29, 2016; http://money.cnn.com/2016/03/29/news/economy/us-manufacturing-jobs/, (last visited March 26, 2017).

operating expenses and/or consumer products? We need an open dialogue and cooperation among competing industries in order to identify problems and solutions.

Another area of innovation needing immediate attention is public transportation and particularly resolving the issue of how we will incorporate functionality in the efficient transport of mass populations in and around our urban cores. This area of intellectual property can be equated directly to the public policy of benefits for citizens. For instance, consider new technology that creates a system of public transport which lowers our carbon footprint in the world. Of course, in order to embrace possible solutions, the innovator would have to overcome the objections of powerful oil companies who may experience decreased market prices in the future.

Every step we have taken as Americans, from the conception of our country until now, has lead us on a path of discovery that has impacted present and future realities both here and around the world. We have created our innovation systems with a sense of duty, honor, and commitment to those who enjoy life and work, and who contribute and create with a sense of cooperation. Our system supported community values and contributed to continuing education. It operated in such a way that people were inspired to learn and contribute to the general good. These innovations and the attendant intellectual curiosity will encourage generations to come. Our task is to perpetuate a system that produces fair and just outcomes, that enables creative exploration of possibilities that reward individuals for their bravery and commitment to finding better solutions.

**Soul of Innovation**

People have ideas about all kinds of things. Will we share them openly? Perhaps someday in the future we can call it a universal behavior. The current focus seems to be on commercializing those innovations, focused solely on the bottom line. Like other species on the planet, when confronted with survival situations, or when faced with the eminent death of our choices or decisions, we instinctively draw on a skill set for protection and view our innovations from a protected perspective or withhold them from public disclosure. It's intrinsic; our sense of natural law that demonstrate a series of patterns in the

way we conceptualize a vast pool of resources, make contributions and seek rewards. Combine that with the chaotic behavior of human nature and we now have a pattern of entitlement on display from every classroom to every courtroom, and in every business transaction in the world.

There are undoubtedly some who seek to control the power of innovation, it is a substantial power and the very essence of democracy. The fairness, justice and balance of power demanded by a democracy can be exploited by those obsessed with the acquisition of power. Democratic systems come at a cost. There are a lot of rules to live by, and balance requires give and take.

When innovation is born, someone will have an epiphany. That knowledge represents power and it is at this point that our systems may be changed. Another attribute of shared knowledge is that it is often the impetus for others to find their own courage to innovate. Ideas today are wrapped in litigation and tied with a pretty bow, to some treasury. We must embrace our civil system and the promise of freedom. Some like to define things, others resolve issues through an ethical balance, each of which is a process of creativity required in the continuation of a rule of law system and the American example of democracy. Innovation would reach an all-time high and that's the most rational future we can have.

**Summation**

With increased intellectual property registrations, property rights are gaining momentum as monopolies, which is in direct opposition to our societal concept of competition and free market trade. It's counterintuitive! Perhaps we need a new vision and law, applicable to everyone that states;

- The right to protect one's creative innovations for profit or contribution through gifting, is limited to a period of ten years, shall be considered a national contribution to creative market fairness and includes the rights of citizens to improve upon the model at issue.

This concept would give a new allotted time period for innovators to expedite profits, allow for a charitable process, and generate new competition in business models for attached gains in economic prosperity. It's simple language for intelligent people trying to do the right things in generating

ethical business functions and foundations, while addressing a public policy formula which solves issues related to extracting value and enabling innovation so that the innovator may improve their life, as well as the lives of citizens here and around the world. I rest my case.

# Youth in Politics: A Comparative Study of Italy and the USA

by: Nora Douglas

This article explores the importance of political participation to a democracy's integrity. For a government to be representative of its people, the people must make efforts to articulate their interests and find ways to implement them in government. The most iconic symbol of a democratic society is the right to vote. However, many citizens (especially youth), do not use this right to their advantage for many reasons. Youth in Italy, for example, have ostensibly lower rates of voting in comparison to the older population and show little interest in voting because they have no interest in politics. They feel as if it does not affect them, and is inconsequential. Not only is this a sentiment expressed in Italy, but there is a global resurgence of political apathy amongst youth, reasons for which will be further discussed in the paper.

It is through our Rule of Law which establishes a balance of power among our executive, judicial and legislative branches that our form of government enables American citizens to participate in and hold accountable American decision makers. Not all countries have a system that enables and encourages participation by the people, especially young people. Using Italy as a contrasting system, this paper seeks to identify the critical components of the Rule of Law system necessary to enable participation.

There are many different political parties in Italy, each having proportional representation in parliament. Italy is divided into twenty different regions; five of which have more legislative and financial freedom than the others due to a provision in Article 116 in the Italian Constitution which grants them home rule, and in return, they must finance health care, school and public infrastructure systems.[1] In addition to that agreement, these regions were granted autonomy to protect their language minorities and to prevent their

[1] The Constitution Of The Italian Republic, 1948 (as Amended June 12, 2003), Official Gazette Dec. 27, 1947, no. 298.

secession from Italy after World War II.[2] This battle for secession highlights an important underlying factor in the lack of political participation; considering the lack of centralized authority in the Italian government. Because power is from the people, citizens must instill authority within the branches of their government. Without this basic form of democracy, political participation can erode following the lack of governmental credibility.

The president of Italy is Sergio Mattarella at the moment (Spring 2017), and unlike the USA, where the president is the head of his political party, Italian presidents are expected to be non- partisan leaders and to basically carry on the role the king of Italy held, to be a figure representing the unity of Italy. The president also makes sure that laws are constitutional; he appoints the Prime Minister, and can terminate Congress if he feels that there is a lack of political cohesion in forming a new government. Italians do not vote for the President or the Prime Minister, they only can vote for the party.

In regards to Parliament; Senators and the various parties representing the population appoint congressional candidates, then citizens vote for the party that they want in Parliament, as opposed to voting on individual candidates' ballots. After the parties receive their votes, Parliament is elected and the President appoints a Prime Minister after consulting delegations from each party. This is the framework in which citizens of Italy articulate their interests and choose their representation in government, in accordance with the constitution of their government. The level of political literacy invested in youths in both Italy and in the USA is very low.

Political participation is defined as; "Those activities by which private citizens that are more or less directly aimed at influencing the selection of government personnel and/ or the actions they take." In the process of the creation of a political culture, one must look at how its citizens are socialized. In most cases, political socialization begins in the home and develops through schooling and community involvement during the individuals' lives. Political

[2] H. Kudo, *Autonomy and Managerial Innovation in Italian Regions after Constitutional Reform*, Tokyo: Faculty of Law and Graduate School of Public Policy, Chuo University (2008).

participation is a part of socialization and it includes conventional and nonconventional forms of political expression. It is important to note, however, the difference between conventional and nonconventional forms of political participation and to note the changes in trends of political participation over time in Italy, both of which will be discussed.

Political participation is integral to a democracy's integrity. For a government to be representative of its people, the people must articulate their interests and find ways to implement them in government. The most iconic symbol of a democratic society is the right to vote. However, many citizens (especially youth), do not use this right to their advantage for many reasons. Youth in Italy, for example, ostensibly have lower rates of voting in comparison to the older population and show little interest in voting because they have no interest in politics. They feel as if it does not affect them and is inconsequential. There are many underlying reasons for this, one being the economic situation in Italy. Italy has one of the highest youth unemployment rates, at 44.2%.[3] Also, according to The London School for Economics, Italy is below the European Union 15 (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom) average for political participation of youth by 4% and is 10% behind Belgium, the country with the highest rates of youth political participation.[4]

As a result, youth in Italy, according to demographic trends, take longer to accomplish "fundamental psychosocial transitions", such as graduating school to find work, and leaving their parent's house for marriage, than other youth in the European Union. This delay also contributes to their lack of participation in politics and social issues in general. A study on the perspectives of political participation across generations offer two main reasons for this delay in

[3] Lorenzo Totaro and Chiara Vasarri, *Italian Youth Unemployment Rises to Its Highest Level Ever*, Bloomberg.com (July 31, 2015), http://www.bloomberg.com/news/articles/2015-07-31/italian-unemployment-rises-with-youth-jobless-at-record-high, (last visited April 10, 2016).

[4] James Sloam, *Young People Are Less Likely to Vote than Older Citizens, but They Are Also More Diverse in How They Choose to Participate in Politics*, EUROPP (2013), http://bit.ly/1aslEkJ, (last visited April 10, 2016).

fundamental transitions: one is the general indifference or lack of regard for political and social issues, and the second is as a direct result of the negative experiences these youths have had in social problems, they feel "powerless" in affecting any type of legislation domestically and they feel as if their input is not valued or needed.[5] This causes a major issue with their participation in government, and it could stem from the lack of political representation on the behalf of youths. Even though they have access to established formal venues of political participation, youth feel that they are ineffective in interest aggregation. This can be damaging to a youth's perspective on political efficacy and can reinforce negative attitudes towards the legitimacy of their government.[6] However, this is only one of many compounding concerns regarding political attitudes in the country.

Another issue is the adult perspective on political participation of youth. Per Cicognani's study, adults have a preconceived notion that young people are unable to come together to formulate conversation related to politics and the issues pertaining to domestic and foreign policies. In addition, Italy's jobs and government are dominated by the "older generation', which exacerbates the youth's ability to experience social and political development and involvement. Youth are often characterized as "being lazy, unproductive, and generally unable to lead or take initiative."[7] This negative attitude towards youth often stems from a lack of understanding of youths' values and world views, and unfortunately, does not contribute to the effort to increase inclusiveness in political discourse and contributions amongst these young

[5]Elvira Cicogani, Cinza Albanesi, and David Mazzoni, *Civic and Political Participation Across Generations in Italy: A Qualitative Study*, Education Sciences, University of Bologna (Italy), (May 11th 2011) *at 1*, http://epubs.surrey.ac.uk/7066/1/Bologna_PIDOP_presentation.pdf, *(last visited April 6, 2017).*

[6] Lucian W. Pye, and Sidney Verba, *Political Culture and Political Development*, Princeton, NJ: Princeton University Press, at 282 (1965).

[7] Elvira Cicogani, Cinza Albanesi, and David Mazzoni, *Civic and Political Participation Across Generations in Italy: A Qualitative Study*, Education Sciences, University of Bologna (Italy), (May 11th 2011) *at 3*, http://epubs.surrey.ac.uk/7066/1/Bologna_PIDOP_presentation.pdf, (*last visited April 6, 2017).*

Italians. It only reupholsters the perception that youth are incapable of contributing to society and politics in a tangible way. Looking forward, to increase inclusiveness, young people must be given incentives to participate in policymaking, and these incentives should be upheld by their communities through afterschool programs and other efforts that are integral to the steps of socialization.[8]

Because of these issues, Italian youth suffer a lack of political representation and low self -efficacy in contributing to the political system. Youth have little credibility and thus have no incentive to become politically active. As one Italian teacher says about having constructive political conversation with young people:

> "It is very difficult to talk to them because they are not able to… they do not watch even the news on TV, they do not follow political news. [...] I have asked them… at home they do not talk about politics, they do not talk at all … they do not know political parties, the difference between left wing and right wing parties…"[9]

This is a telling narration about the widespread lack of the processes of political socialization in the home/family. This is a sharp contrast to political socialization in the USA. Politics tends to take center stage in American society, as politics are closely entwined with values that Americans hold closely, the reaffirmation of civil rights through widespread media attention and the power of the vote. However, this still has not aided the American youth in becoming more politically active in voting, as less than half of youth vote in Presidential elections, with these youths seeking alternative methods of

[8] Lucian W. Pye, and Sidney Verba, *Political Culture and Political Development*, at 320, Princeton, NJ: Princeton University Press, at 282 (1965).
[9] Elvira Cicogani, Cinza Albanesi, and David Mazzoni, *Civic and Political Participation Across Generations in Italy: A Qualitative Study*, Education Sciences, University of Bologna (Italy), (May 11th 2011) *at 4*, http://epubs.surrey.ac.uk/7066/1/Bologna_PIDOP_presentation.pdf, (*last visited April 6, 2017).*

political involvement, through online activism, protests or civic action.[10]

In addition to the differences in political culture, American culture allows that parents, in comparison to Italians, disseminate their ideas (in varying degrees of depth) about their party alignment, their views on domestic and foreign issues, and their constant reminder of the need for their children to embrace and be assertive for one's rights; as depicted in the famously American phrase, "I'll sue you!" Indeed, politics is passed on through generations, and children end up growing up holding similar views as their parents, then passing it on to their own children. In addition, the USA was built on the premise of 'No taxation without representation,' so leaders are held accountable and their actions are scrutinized to ensure that tax dollars are not wasted. In short, there is a belief that their taxes are for their community's benefit, and that their leaders will receive and represent their interests.[11] Attitudes such as these, however, could only be formed after certain cultural aspects have been established over the course of a country's history.

In the Referendum of Italy in 1946, when voters chose between the Monarchy and the Republic, half the voters were in favor of the Monarchy and the other half of the Republic. The south desired the monarchy, and the north voted for "institutional transformation."[12] This shows an issue with the government's perceived legitimacy. Italy's parliamentary republic was built upon a shaky foundation, a foundation that lacked unity between the north and south regions of Italy. Thus, there are large conservative parties that advocate for the return of a Monarchy, and the extreme right who have such distaste for the republic that they would rather have it replaced by some form of totalitarianism.[13] The

[10] Russel Dalton, *Youth Participation Beyond Elections*, School of Social Sciences (2012): 1-14, UCI School of Social Sciences, University of California, (2011), (last visited Feb. 9, 2017).
[11] Lucian W. Pye, and Sidney Verba, *Political Culture and Political Development*, at 285, Princeton, NJ: Princeton University Press, at 282 (1965).
[12] Mario Quaranta, *The Rise of Unconventional Political Participation in Italy: Measurement Equivalence and Trends, 1976-2009*, at 252, Bulletin of Italian Politics, 2012th ser., 4, no. 2 (January 01, 2012).
[13] Id. at 285.

reason for this split is due to the political corruption after the unification of Italy in 1870. After the establishment of the liberal parliamentary republic, the elections were rigged and controlled by party bosses. This kept the country from advancing and it was backward in comparison to its European counterparts. Consequentially, the republic was met with distrust due to the rampant corruption, and democratic traditions were not established.

Around this time, fascism took hold. Once Italy became entrenched in the First World War, issues only worsened. Citizens were unhappy with Italy's foreign policy, because instead of receiving large territorial gains, as was expected in return for the sacrifice of 600,000 Italian lives, they only received a small portion; and the economy was collapsing (exacerbated by the return of millions of troops to Italy after the war's end). Many Italians were disillusioned with the inefficacy of their government and, consequentially, wanted change. Fascism, in the grip of Benito Mussolini, offered the promise of national unity and political stability, a strong foreign policy, and a return to the formal glory of the Roman Empire. During his rise to power in the 1920s, Mussolini used propaganda and violence to crush his opposition and he limited worker's rights by preventing employees from striking by bringing their employers under his control. King Victor Emmanuel was forced to give him the position of permanent Prime Minister in 1929 and Italy was under his total control. After the Italy's multiple losses in World War II, however, Mussolini lost his power during the War. [14]

This legacy of dissatisfaction with the government carried on to modern-day Italy and explains why there are parties who advocate for a return to the monarchy. However, different sentiments are reflected in other parties as well, such as those who look favorably upon the political system as it is, but demand changes to address the institutional inefficacy. Due to the Italian government's perceived lack of credibility, Italian citizens lack interest in engaging in the political discourse in their country, and consequentially, have no desire to learn about political issues and are not knowledgeable about their political affairs. In addition, their identification with political parties and other means of political participation is minimal, with ostensibly negative views

[14] Donald Sassoon, *Mussolini and the Rise of Fascism*, London: HarperPress, (2007).

towards them. Almond and Verba record the results of a poll in their book, *The Civic Culture*, regarding the level of satisfaction with one's country's government and their perception about their government, and the poll asks: "Speaking generally, what are the things about this country that you are most proud of?" Under "Government, political institutions", only 3% of those polled have pride in their government, 1% have pride in social legislation, and 27% are proud of "Nothing, or [they] don't know", in comparison to 85%, 13%, and 23%, respectively, in the USA.[15]

This indicates the need for a change which, according to a study, Italians have taken into their own hands. Despite a lack of participation in conventional methods of political participation, Italy has seen an increase in unconventional methods of political participation[16], such as sit-ins, demonstrations, protests, and symbolic occupations, in attempt to affect change in decision making.[17] One of the reasons for the increase in unconventional participation is the tendency for Italians who "reject participation in electoral politics" and lack trust in political parties to turn to advocating for community causes within their localities instead.[18] This trend began after World War two and picked up momentum as citizens' concerns became overarching global concerns with the spread of globalization and increased technology in communication systems.

**Conclusion**

The Italian Republic has come a long way from the days of fascism, but inherent institutional distrust has affected their government's efficacy and its ability to represent the people. The USA was also built on a legacy of distrust of authority, exemplified by our second Amendment, 'the Right to Bear Arms',

[15] Gabriel Almond and Sidney Verba, *The Civic Culture; Political Attitudes and Democracy in Five Nations, an Analytic Study*, Boston: Little, Brown, (1965).
[16] Samuel H. Barnes, and Max Kaase, *Political Action: Mass Participation in Five Western Democracies*, Beverly Hills, CA: Sage Publications, (1979).
[17] Donatella Della Porta, *The Global Justice Movement: Cross-national and Transnational Perspectives*, Boulder: Paradigm Publishers, (2007).
[18] Mario Quaranta, *The Rise of Unconventional Political Participation in Italy: Measurement Equivalence and Trends, 1976-2009*, at 257, Bulletin of Italian Politics, 2012th ser., 4, no. 2 (January 01, 2012).

and the country's colonial roots. These similarities explain the downward trend in political participation amongst youth, but as these youths grow older and become adults, they will understand their clout in the system and become part of that system from which they were marginalized. The key to preventing this in the future is political socialization from birth. Youth must understand the society in which they live in, their history, the mistakes of their predecessors and how to avoid them. The cyclical nature of life extends to government as well, and society must escape the traps of history and progress!

# Death Spiral Financing

by Alina Marian

"Death spiral", "toxic", "dangerous to your health", "the grimmest of reapers", are just some of the words used to characterize some of the Private Investments in Public Equity (PIPE) transactions. A PIPE deal involves private investors who purchase restricted shares from a public company at a predetermined price. In return, the company files a resale registration statement, thus allowing the investor to resale the shares to the public[1]. The mechanism of a PIPE deal can be broken down by each of the letters forming its acronym[2]: it involves a *private* party willing to make an *investment* in a *public* company who, in return, wants to raise capital by selling *equity.*

As its name suggests, a PIPE transaction has a dual nature, combining aspects of a private placement transaction with aspects of a public offering[3]. The first component is the private placement of securities issued by a public company. Such securities can range from common stock, convertible or non-convertible bonds, convertible or non-convertible preferred stock, to warrants, or any combination of them. According to Section 5 of the Securities Act of 1933, it is unlawful to offer to buy or to sell any security, "unless a registration statement has been filed" with the SEC (15 USCS § 77e). However, precisely because of the private aspect of PIPEs, these types of transactions are exempt from the registration requirements. Section 4(a)(2) of the Securities Act of 1933 states that registration requirements will not apply to "transactions by an issuer not involving any public offering."( 15 USCS § 77d). Moreover, Rule

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[1] J. D. Hogboom, *Private Investment in Public Equity: An Overview*. New Jersey Law Journal, CLXXVII (7), 621st ser., 2004, https://www.sec.gov/info/smallbus/gbfor25_2006/hogoboom_invest.pdf, (last visited January 13, 2017).

[2] D. J. Hoffer, *Quagmire: Is the SEC Stuck in a misguided war against PIPE financing?* (2011*),* Transactions: The Tennessee Journal of Business Law, 12, 9-36, http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1198&context=transactions, (last visited January 13, 2017).

[3] *Id*., at 13.

506 of Regulation D also provides safe harbor from registration requirements to investors and companies involved in a private transaction (17 CFR 230.506).

The second aspect of a PIPE—the public aspect—involves the investors obtaining liquidity for their investment by being able to resell the securities to the general public.[4] This can be achieved in two different ways. First, the issuer can file a registration statement with the SEC to register the reoffer and resale of the common shares held by the private investors. The registration statement can be negotiated to be a condition of closing the deal or, more frequently, to be filed with the SEC within a number of days after the private placement is closed.[5] Once the resale registration is approved, the investors can freely sell their shares on the public market.[6]

Another way investors can obtain liquidity in their investment is by getting around the registration requirement all together. Rule 144 of the Code of Federal Regulations (CFR) establishes the following exemption: "If any person sells a non-exempt security to any other person, the sale must be registered unless an exemption can be found for the transaction." Section 4(a)(1) of the Securities Act establishes such an exemption, if the transaction involves a "person other than an issuer, underwriter, or dealer." Section 2(a)(11) of the Securities Act, broadly defines the term "underwriter" to mean any person who purchases securities from an issuer "with a view to … distribution". The term "with a view to" refers, in this context, to having the intention to distribute (resell) the securities obtained from the issuer, and it has been deemed to require knowledge of the mental state of the purchaser.

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[4] J. T. Hartlin, *Despite Recent Setbacks in the Courts, the SEC Remains Focused on Short Sales in PIPE Transactions*, 2009, https://www.paulhastings.com/docs/default-source/PDFs/1351.pdf, (last visited January 10, 2017).
[5] *Id*., at 163.
[6] L. M. Lerner, *Disclosing Toxic PIPEs: Why the SEC Can and Should Expand the Reporting Requirements*. The Business Lawyer, *58*(2), 655-688, 2003, http://www.jstor.org.ezproxy.fau.edu/stable/pdf/40688136.pdf?acceptTC=true, (last visited January 9, 2017).

Consequently, the preliminary note to Rule 144 states that, in order to determine the intention of the investors, prominence must be given to such factors as the length of time the investors hold on to the securities. Pursuant to Rule 144 (i), if six months elapse between the purchase of the securities and their subsequent resale, the purchaser is not considered to be engaged in the distribution of securities (17 CFR 230.144(i)), and therefore, he/she is not an underwriter.[7] Thus, a PIPE investor can freely resell the unregistered securities after holding them for six months.

This type of financing has been increasingly popular over the past twenty years. From 300 PIPE deals in 1996, there has been a significant growth to over 1200 deals in 2007[8]. According to Placementtracker, a prominent research and analysis provider of the PIPE market, there were 898 such transactions in 2015, totaling $50.7 billion[9].

The popularity of PIPEs can be attributed to a few undeniable advantages they offer. From the public companies' point of view, such transactions allow them to raise capital faster, and more efficiently than through more conventional methods, while getting around regulatory obstacles. The investors, on the other hand, are attracted by the potential for bigger returns, greater liquidity, and a more secure investment.[10]

And yet, in spite of all the above-mentioned advantages—some might argue because of some of these advantages, there has been a lot of literature written about the ethical and legal ramifications of a certain type of PIPE deal, structured in a way that it often leads to the destruction of the company

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[7] E., Klein, *How To Raise Capital Using A PIPE*, Sept. 5, 2013, https://www.law360.com/articles/470125/how-to-raise-capital-using-a-pipe, (last visited January 16, 2017).
[8] Hoffer, *supra* note 2, at 11.
[9] S. R.Systems, *PlacementTracker Publishes 2015 PIPE Market League Tables*, Jan. 12, 2016, http://globenewswire.com/news-release/2016/01/12/801442/0/en/PlacementTracker-Publishes-2015-PIPE-Market-League-Tables.html, (last visited January 16, 2017).
[10] Hoffer, *supra* note 2, at 20.

involved, hence the "death spiral" name. In such transactions, the investor extends a loan to a public company in exchange for convertible securities, such as bonds or preferred stock, which can be later converted into common stock, usually at a discount to the market price at the time of the conversion. This discount amounts to an "unlimited price reset provision"[11], ensuring that, regardless what the market price of the stock is on the day of the conversion, the investor will be able to convert its securities at a price below the market. Thus, a PIPE investor can benefit even if the company's price per share is severely devalued. The discount—usually between ten and thirty percent,[12] is included as an incentive for the initial illiquidity of the convertible securities,[13] given that the investor, as presented above, has to wait 60 days to be able to convert and sell his/her share, or until the company files a resale registration certificate.

In addition, a typical "death spiral" loan does not state a predetermined number of shares of common stock, but instead it allows for a flexible conversion rate which is always less than the market rate at the time of conversion.[14] Consequently, the lower the price of the stock, the more shares are necessary to be issued when the investor converts its securities into common stock. For example, an investor extends a $1,000,000 loan to a public company in exchange for convertible bonds. Instead of a fixed conversion rate— $1,000,000 in exchange for 40,000 shares, for example, the loan allows for a "floating conversion ratio."[15] When the investor decides to convert his/her debenture, the initial $1,000,000 investment can be converted in 500,000 shares if the price is $2.00 a share or, alternatively, 1,000,000 shares if the price per share falls to $1.00.[16]

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[11] Lerner, *supra* note 6, at 658.
[12] *Id.*
[13] Klein, *supra* note 7.
[14] A. Phung, *What are 'death spiral' convertible bonds?*, June 8, 2006, http://www.investopedia.com/ask/answers/06/deathspiralbond.asp, (last visited January 16, 2017).
[15] *Id.*
[16] M. Levine, *Death-Spiral Convertible Financier Has a Lot of Fun*, March 12, 2015, https://www.bloomberg.com/view/articles/2015-03-12/death-spiral-convertible-financier-has-a-lot-of-fun, (last visited January 7, 2017).

This situation creates an incentive for the investor to actually drive the stock price down, by selling the stock short prior to the conversion, knowing that once the conversion is made, the price will fall even further. There is little risk for the investors since they can use the convertible debenture to cover their short positions. Furthermore, at the time of the conversion, the stock is being diluted by the extra shares entering the market, which drives the price per share even lower, hence the phrase "death spiral financing."[17] Meanwhile, the PIPE investor is comfortable with the stock price dropping knowing that, thanks to the reset price provision, he/she will convert at a price below the market.

In 2003, Thomas Newkirk, at the time the Associate Director of the SEC's Division of Enforcement, famously summarized this situation: "Certain convertible securities, particularly those referred to as "toxic" or "death spiral" convertibles, present the temptation for persons holding the convertible securities to engage in manipulative short selling of the issuer's stock in order to receive more shares at the time of conversion."[18]

The aftermath of such a deal can be devastating for the company who undertakes it. In 2000, at the climax of the dot-com bubble, dozens of small cap companies looking to finance their rapid growth lost upwards of 98 percent of their value within one year of closing a PIPE loan.[19] In some cases, following the devaluation of the stock, PIPE investors can convert to enough stock to actually gain control of the company. In such instances the investors can choose to liquidate the company, or sell it to the highest bidder.[20]

The question, of course, is why any company would enter a loan that can potentially have destructive consequences to their value. Usually, they are small cap companies in desperate need of financing, but who don't want to, or

[17] Lerner, *supra* note 6, at 658.
[18] N. Nead, *Death Spiral Finance: Avoiding the Temptation for Easy Money*, March 22, 2016, http://investmentbank.com/death-spiral/, (last visited January 10, 2017).
[19] *PIPEs: Quick Financing, the Hail Mary Pass and New Investors*, http://www.placementtracker.com/News/PR11.15.04FinEngineering.htm, (last visited January 02, 2017).
[20] Lerner, *supra* note 6,at 658.

cannot go through the traditional venues. A good example of such a company is MannKind Corporation. In August of 2015, MannKind, a small cap pharmaceutical company, had a $100 million loan in convertible debt that had to be repaid or refinanced by the 15th of that month[21]. Already in a bad financial position, due to mismanagement in the development of their product, inhaled insulin Afrezza, MannKind did not have many options available to them. The company decided to restructure the debt with a combination of discounted stock and additional debt. According to Adam Feurestein writing for The Street, the worst part of the debt restructuring deal was the "stock-for-debt exchange (…), a classic definition of the death spiral financing". Even though MannKind managed to negotiate a floor price for the conversion, the results of this transaction were devastating for its stock price.[22]

The graph below[23] is emblematic of "death spiral" loans' aftermath. In June 2015, the price per share of Mannkind stood at around $6.50. Two months


[21] A. Feuerstein, *MannKind Relies on 'Death Spiral' Financing to Help Settle Looming Debt*, July 29, 2015, https://www.thestreet.com/story/13236205/1/mannkind-relies-on-death-spiral-financing-to-help-settle-looming-debt.html, (last visited January 16, 2017).

[22] *Id.*

[23] Stockcharts, http://stockcharts.com/csc/sc?s=MNKD&p=W&yr=2&mn=0&dy=0&i=t32540145135&r=1484599262477, (last visited January 16, 2017).

later, when the restructured deal came into effect, the price started dropping and it never recovered, hitting all-time lows in October, 2016. As of January 16, 2017 Mannkind (MNKD) is trading at $0.69.

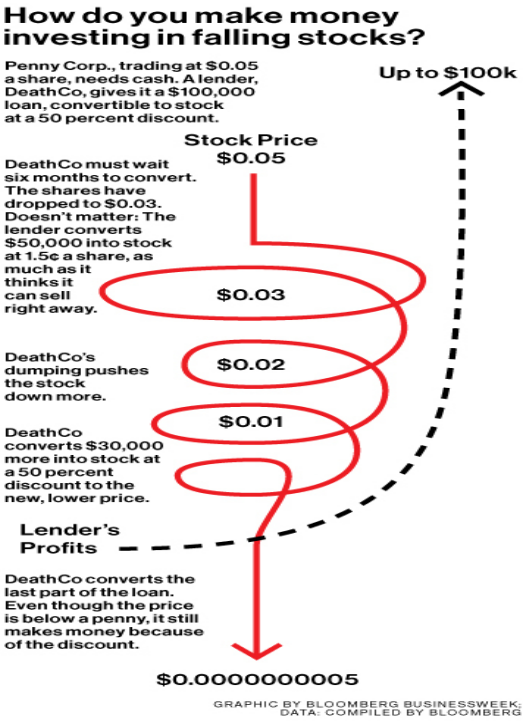
The 2015 agreement allows MannKind to issue new convertible debt in 2018 to cover $28 million of the $100 million they owe. The conditions of the 2018 issuance are similar to those of the previous transaction.[24] This could be a classic example of being bound to repeat history if we don't learn from our mistakes, or maybe just an example of a company desperate to stay afloat through any means necessary, even at the expense of its shareholders.

While many companies that enter a PIPE transaction see the value of their stock diminish, PIPE investors tend to recover their money with a substantial return. An article in Bloomberg BusinessWeek reveals some of the inner workings of such investors. The article is constructed as a reveal piece directed at Josh Sason, a 27-year-old who built a multi-million-dollar fortune by using "death spiral" lending techniques.[25] His company, Magna, has been diversified over the years to include a "ventures department" and an entertainment department. Sason even made a cameo in "Bleed for this", a movie in which he invested a few million dollars.[26] But his company's beginnings are a lot less glamorous.

Sason set up Magna as a last resort lender for struggling penny stock companies. According to one of Magna's former employees, they would look up companies online and cold-call them, offering money in exchange for steep-discounted stock.[27] More often than not such companies were eager to accept the deal. Based on an analysis of 80 public fillings from companies that have entered financing contracts with Magna, Bloomberg BusinessWeek reveals that their shares drop on average 55 percent over the year following

[24] Feuerstein, *supra* note 21.
[25] Z. Faux, *Josh Sason Made Millions From Penny-Stock Financing*, March 12, 2015, https://www.bloomberg.com/news/articles/2015-03-12/josh-sason-made-millions-from-penny-stock-financing, (last visited January 16, 2017).
[26] *Id.*
[27] *Id.*

the closing of the loan. While Josh Sason calls his company a "global investment firm", Faux, the Bloomberg author, thinks a different moniker would be better suited: "pawnshop for penny stocks". The graph below[28] shows how Josh Sason rarely loses in a "death spiral" deal:




Not surprisingly, PIPE investors like to conduct their transactions far from the public eye. To quote Josh Sason, the antihero of the above Bloomberg article, "I'm not going to give away the details of how we do what we do, (…) We create businesses, and we invest."[29] It is this propensity for being under the

[28] Bloomberg Business Week, https://assets.bwbx.io/images/users/iqjWHBFdfxIU/iUXV1OEVdrNY/v2/400x-1.jpg, (last visited January 2016).
[29] Faux, *supra* note 25.

radar that raises ethical and legal questions regarding PIPE deals.

PIPEs, when structured properly, succeed in getting around the disclosure regulations established by the SEC through the Securities Act of 1933—directed at the primary markets, and the Securities Exchange Act of 1934—directed at the secondary markets. The primary purpose of these regulations is to "compel full disclosure to the public of all material information and to prevent fraud and misrepresentation in the interstate sale of securities."[30] We will focus on the disclosure requirements to highlight the way "toxic" PIPE transactions manage to stay under the radar.

The Securities Act of 1934, in Sections 13(d)(1), 13(d)(3), and 14(d)(1), establishes disclosure rules meant to protect the public interest when an entity makes a tender offer—wanting to gain control of a company by purchasing more than 51 percent of its common stock, or acquires five percent or more of a company's common stock, exercisable within sixty days[31]. Such disclosure rules were put in place by Congress to ensure a company has notice when somebody accumulates a large portion of its common stock[32].

Section 13(d)(1) requires "any person who, after acquiring directly or indirectly the beneficial ownership of any equity security is (…) the beneficial owner of more than 5 per centum of such class" to file, within 10 days, any documents the SEC considers necessary or appropriate. The information required by the SEC is extensive, ranging from disclosing the background and identity of all persons involved, the source and amount of the funds, the purpose of the transaction, to "information as to any contracts, arrangements, or understandings… including but not limited to transfer of any of the securities, joint ventures, loan or options arrangements."[33] Section 14(d)(1) of the Securities Act of 1934 establishes similar disclosure rules for those

[30] Lerner, *supra* note 6, at 671.
[31] Lerner, *supra* note 6, at 659.
[32] M. Gill, & D. O'Neal, Section 13(d): *The Challenges of "Group Membership,* March 2009, http://www.alston.com/Files/Publication/3d644b01-c52a-442d-afaa-a02ae6cd005f/Presentation/PublicationAttachment/79bfe8af-9c88-4d42-9b6b-3e9e91b1e38f/Section%2013(d)%20Article_1.pdf, (last visited January 10, 2017).
[33] *Id.*

initiating a tender offer in a bid to gain control over a company (17 C.ER. §§ 240. 14d-l to -101).

Investors can circumvent these disclosure rules by timing their actions carefully. PIPE transactions usually take longer than sixty days, therefore, at the time of the initial contract, the PIPE investors are not viewed as potential owners of five percent or more, or as tender offerors, even though they could potentially manipulate the company's stock by engaging in short selling, and eventually even gaining control of the company[34].

PIPE investors also manage to avoid the disclosure requirements contained in Regulation Fair Disclosure (FD). Regulation FD was passed by the SEC in order to level the play field between institutional investors and individual investors, by requiring public companies to not exclude the general public when disclosing relevant information.[35] Aiming to promote full and fair disclosure, Regulation FD requires that when an issuer discloses material nonpublic information to certain individuals or entities, the issuer must make that information available to the general public.[36] However, Regulation FD applies only to the company issuing the stock, it does not cover the intentions of the private investor, even though he/she could gain control of the company by taking a short position in the stock and starting the "death spiral."[37]

In the Selective Disclosure and Insider Trading, Securities Act Release No. 33-7881, the SEC states: "selective disclosure leads to a loss of investor confidence in the integrity of our capital markets. Investors who see a security's price change dramatically and only later are given access to the

[34] Lerner, *supra* note 6, at 659.
[35] *Regulation Fair Disclosure – Reg FD*, Investopedia, Nov. 25, 2003, http://www.investopedia.com/terms/r/regulationfd.asp?ad=dirN&qo=investopediaSiteSearch&qsrc=0&o=40186, , (last visited January 16, 2017).
[36] Regulation FD, 17 C.F.R. §§ 243.100-.103, 2002.
[37] Lerner, *supra* note 6, at 660.

information responsible for that move rightly question whether they are on a level playing field with market insiders."[38]

In view of this opinion, it makes sense for the SEC to take another look at the mechanisms surrounding PIPE transactions. That does not mean that the SEC has not kept an eye on these deals, especially given the toxicity of some of them. In the instances when the SEC decided to pursue legal action against PIPE deals, it argued that the short selling under these conditions violates Section 5 of the Securities act of 1933. [39] Another argument brought forth by the SEC was that such investors are guilty of insider trading, in violation of Section 10(b), Rule 10b-5 and Section 17(a) of the Securities Act. [40]

The SEC's attitude towards a PIPE investor engaging in short selling prior to the issuer obtaining a resale registration statement, has been that it violates the registration requirements stated in Section 5 of the Securities Act. In a short sale the seller does not yet own the shares he/she puts up for sale, but rather he/she borrows the securities from another party. Next the short seller delivers the securities to a buyer, completing the sale. The buyer has full ownership of the shares delivered in the transaction, while the short seller still has to return the securities to the entity that lent them. This part of the short sale is known as "covering" the short position, and it is achieved when the short seller buys securities on the market and returns them to the party from whom he/she borrowed them[41]. In a short sale, profit is made if the stock's price decreases between the time the short sale is made and the time it is covered. If the securities' price increases, the short seller incurs a loss.[42] PIPE investors use short sales to hedge their investment in the public company, and generally

[38] *Final Rule: Selective Disclosure and Insider Trading*, United States Securities and Exchange Commission, https://www.sec.gov/rules/final/33-7881.htm, (last visited January 16, 2017).
[39] Hoffer, *supra* note 2, at 25.
[40] Hartlin, *supra* note 4, at 164.
[41] Hoffer, *supra* note 2, at 26.
[42] *Id.*

cover their short position with the share obtained through the conversion of their convertible debenture.

Another avenue the SEC used against PIPE investors has been the insider trading violation. If an investor trades—usually by shorting the stock, knowing that there is a PIPE deal in the making, the SEC has argued that he/she is guilty of insider trading.[43] An insider trading claim has to be proven by showing that the information used by the trader is material and non-public, and that the trader with knowledge of this information had either a fiduciary duty to the shareholders of the issuer—the classic theory of insider trading, or that the trader misappropriated confidential information, thus breaching the duty of confidence owed to the issuing company itself—the misappropriation theory.[44] The misappropriation theory has been at the base of insider trading claims against PIPE investors, since they are not actual corporate insiders of the company. The SEC believes that the confidential agreement the two parts of a PIPE transaction create when entering the contract, also creates the fiduciary duty of loyalty on the part of the investor towards the issuer.[45]

So far the SEC has been unsuccessful in proving its claims against PIPE investors who refused to settle. One case that brings together both of the claims analyzed above is *SEC vs. Mangan.*[46] *Mangan* represented a registered broker-dealer who acted as the placement agent for a PIPE offering involving CompuDyne Corporation in 2001. After the PIPE transaction was closed, but before it was announced publicly, Mangan instructed his broker to open a short position in CompuDyne, whose share price was $14.16. Immediately after the public announcement of the PIPE deal, the share price climbed to $15.20, before falling and closing at $14.25.[47]

In December 2006, the SEC filed a complaint against John F. Mangan, Jr. stating that the defendant committed an unlawful insider trading act, in

[43] Hoffer, *supra* note 2, at 28.
[44] Hartlin, *supra* note 4, at 170.
[45] Hoffer, *supra* note 2, at 31.
[46] 598 F. Supp.2d 731 (W.D.N.C. 2008).
[47] Hartlin, *supra* note 4, at 165.

violation of Section 10(b), Rule 10b-5 and Section 17(a), by short selling CompuDyne securities before the PIPE deal was announced to the public. In addition, the SEC claimed that Mangan violated Section 5(a) and Section 5(b) of the Securities Act by engaging in the sale of unregistered securities when he covered his short position in CompuDyne with securities obtained through the PIPE transaction.[48]

The Court ruled against the SEC, dismissing both the claim of insider trading, as well as the claim of selling unregistered securities. In relation to the latter, the Court went so far to call the SEC's Section 5 violation claim "creative."[49] The Court contradicted the SEC's view that the shares used to cover the short positon are basically sold at the time the position is created, resulting in an unregistered sale of securities. The defendant, the Court noticed, absent the closing of the PIPE transaction, would have had to cover his short position with shares purchased in the public market. Additionally, the shares sold in the short position were unrestricted, the buyers being free to trade them. Consequently, the Court concluded that "no sale of unregistered securities occurred as a matter of law."[50]

Regarding the insider trading claims, the court stated that the most important factor in its decision was the relation between changes in the CompuDyne stock price and the public announcement of the PIPE transaction: "price movement is determinative of materiality under this factual record."[51] CompuDyne price per share actually rose right after the public announcement of the PIPE deal and it closed higher than it was at the time Mangan decided to take a short position in the stock. Therefore, the Court concluded that the defendant's knowledge of the transaction was "immaterial as a matter of law,"[52] since the PIPE did not have a negative influence on the stock price.

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[48] *Id.*
[49] *Id.*, at 168.
[50] *SEC vs. Mangan*, Civil Action No. 3:06-CV-531 (W.D.N.C. Dec. 28, 2006), http://online.wsj.com/public/resources/documents/mangan.pdf, (last visited January 16, 2017).
[51] *Id.*
[52] *SEC vs. Mangan, supra note 49.*

It is significant for the purpose of our article to follow the fate of the CompuDyne Corporation. On August 7th, 2007, less than a year after the SEC brought claims against Mangan, CompuDyne announced that it had entered into an agreement to be purchased by an investor group via a cash tender offer.[53] The agree-on offer price was $7.00 per share, a "significant premium"[54] of 32 percent over the August 6th 2007 closing price of CompuDyne stock. Compare this to the 2001 price per share, around $15.00. While there were many circumstances that contributed to CompuDyne's eventual demise, the PIPE transaction it entered in 2001 was at least a symptom, if not a contributing factor, of the company's precarious financial situation.

**Conclusion**

PIPEs are the answer that free markets offer companies looking to obtain capital in exchange for equity, without having to go through the lengthy and expensive process of a public offering. This type of financing presents many advantages for both parties, the private investors, and the public companies. It is because of these advantages PIPEs have increased in popularity, and undoubtedly, they will continue to be part of the corporate financing landscape. Along with this increase in popularity, there's also been an increase in literature written about PIPEs. More specifically, about a certain type— the so called "toxic" PIPEs, who tend to lead to severe devaluation of the involved company's stock. By including a reset price provision—allowing the investors to convert their securities at a discount to the market price at the time of the conversion, these deals essentially ensure that the investor will always make a sizable return, even if the stock drops considerably. Moreover—due to the floating conversion ratio, PIPEs even offer investors an incentive to drive the price down, which they can achieve through short selling the stock. The short

[53] *CompuDyne Corporation Agrees to be Acquired by Investor Group for $7.00 Per Share in Cash* [Press release], The Gores Group, Aug. 7, 2007, http://www.gores.com/pressreleases/compudyne-corporation-agrees-to-be-acquired-by-investor-group-for-7-00-per-share-in-cash/, (last visited January 15, 2017).
[54] *Id.*

selling starts the "death spiral", which is only made worse by the eventual conversion and, consequently, dilution of the stock.

The experts' points of view have not been uniform. There has been a lot of opinions written in defense of such transactions, arguing that the companies who enter them are usually in a bad financial position. They argue that a PIPE loan, even structured in such a way that it could turn toxic, at least gives the company a chance to recover. Other researchers have underlined that toxic PIPE deals rarely have a happy ending for anyone, but the PIPE investors. Furthermore, the ones who suffer in the end are the shareholders, the individual investors who are largely kept in the dark with respect to the intentions of the PIPE investor.

The SEC's claims against PIPEs investors have largely been based on the sale of unregistered securities, as well as insider trading. The courts, however, have ruled against these claims, finding the SEC's arguments "creative."

One aspect the SEC has, mostly, ignored so far, is the disclosure requirements that PIPE investors manage to avoid. By engaging in short selling and manipulating the stock price to drop, PIPE investors are essentially in a positon to acquire more shares of the company, to the point where they can even gain control over it. In such cases many have argued that the disclosure rules 13(d)(1), 13(d)(3) and 14(d)(1)—applicable to tender offerors and purchasers of more than five percent of a company's stock, should extend to the PIPE investors. The general public has a right to know if the PIPE investor intends to open a short position in the company, given the significant consequences such an action has on the company's stock value.

# Does our Current Regulatory System Incentivize Pharmaceutical Companies to Commit Fraud while Ignoring Research and Development Duties?

by Abel Roman

## Introduction

On November 4th, 2013, global health care giant Johnson & Johnson and its subsidiaries reached a settlement amount of $2.2 billion dollars.[1] Considered one of the largest health care fraud settlements in United States history, Johnson & Johnson agreed to pay this amount to resolve the civil and criminal allegations of promotions not approved as safe and effective, kickbacks to physicians, and violations of statutes,[2] particularly violations of the False Claims Act.[3] This type of offense has been common with pharmaceutical companies in the past ten years in regards to false advertising, but the federal government still gives pharmaceutical companies tax breaks for advertising which represents billions of dollars in lost revenue for the federal government.[4] With these tax exemptions, pharmaceutical companies are given an incentive to commit fraud for corporate greed while neglecting to put funds towards research and development.

Johnson & Johnson is not the only pharmaceutical company that has been fined for illegally promoting, or misbranding a drug. Consider the following examples:

- Pfizer and Merck & Co., two of the largest pharmaceutical companies in the world, were fined for misbranding or

[1] *Johnson & Johnson To Pay More Than $2.2 Billion To Resolve Criminal And Civil Investigations*, The U.S. Department of Justice, https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations, Nov. 4, 2013, (last visited March 12, 2017).

[2] Id.

[3] The False Claims Act, 31 U.S.C. §§ 3729–3733, imposes liability on persons and companies (typically federal contractors) who defraud governmental programs.

[4] *Sen. Franken Introduces Bill To End Tax Breaks For Drug Company Advertising*, U.S. Senate Al Franken, https://www.franken.senate.gov/?p=press_release&id=3384, Mar. 3, 2016, (last visited March 12, 2017).

promoting drugs illegally with the intent to defraud or mislead.

- Pfizer was fine $2.3 billion dollars in 2009, one of the largest criminal fines ever imposed in the United States. Pfizer pled guilty to misbranding Bextra with the intent to defraud or mislead.[5] Bextra was a painkiller that the FDA had previously reviewed and had found that the specified dosage was dangerously high.[6]
- Merck & Co. settled for a fine of $950 million dollars for illegally promoting the pain killer, Vioxx. Merck & Co made false or misleading statements about the drug's heart safety to increase sales and promoted Vioxx as a treatment for arthritis before it had been approved for that use.[7]

This type of behavior shows that a more affirmative control needs to be taken against these companies, particularly when they are being exempt from paying taxes for the promotion of their drugs.

Johnson & Johnson, Merck & Co., and Pfizer are three of the largest global pharmaceutical companies with millions of dollars in net earnings every year. Johnson & Johnson has recorded a revenue of $212 billion dollars in the past 3 years while also spending $64 million in marketing and $24 billion in research and development.[8] Merck & Co. has recorded $133 billion dollars in revenue the past 3 years while spending $36 million in marketing and 22 billion in

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[5] *Justice Department Announces Largest Health Care Fraud Settlement In Its History*, U.S. Department of Justice, Sept. 2, 2009, https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history, (last visited March 12, 2017).

[6] Id.

[7] *U.S. Pharmaceutical Company Merck Sharp & Dohme To Pay Nearly One Billion Dollars Over Promotion Of Vioxx®*, U.S. Department of Justice, Nov. 22, 2011, https://www.justice.gov/opa/pr/us-pharmaceutical-company-merck-sharp-dohme-pay-nearly-one-billion-dollars-over-promotion, (last visited March 12, 2017).

[8] Annual Report 2014 Johnson & Johnson, http://files.shareholder.com/downloads/JNJ/3799648053x0x807837/30638d44-13ae-47e2-bd6d-fe40ddebc15a/place_holder_annual.pdf, (2014), (last visited March 12, 2017).

research and development.[9] Pfizer has recorded $160 billion dollars in revenue the past 3 years while spending $45 billion dollars on marketing and only 22 billion on research and development.[10] These fortune five hundred companies account for $146 billion dollars in marketing and only $70 billion in research and development. From 2012 to 2014, the Fortune 500 pharmaceutical companies mentioned above accumulated a total revenue of $506 billion and net earnings of $108 billion dollars. In the past three years alone, these Fortune 500 pharmaceutical companies have contributed 7.2% of their total revenue to Research & Development, but have expended 28.8% on marketing and administrative costs. The marketing expenses these companies accumulated surpass how much they have made in net revenue in the span of three years by $37 billion dollars, yet net revenue has surpassed research & development expenses by $38 billion dollars, which indicates their priorities in regards to funding the company's programs.

Pharmaceutical companies began to focus on marketing and reaching consumers directly during the early 1990s, in part due to the aging of baby boomers, and the increase in the number of patients who are seeking more medical information and are actively participating in decisions affecting their health.[11] In regards to the increase of Direct-to-Consumer advertising of prescription drugs, in August of 1997, the FDA issued Guidance entitled, "Guidance for Industry: Consumer-Directed Broadcast Advertisements." That publication clarified the Agency's interpretation of the existing regulations.[12] The clarification report released by the FDA opened a whole new marketing sector for pharmaceutical companies to reach their

[9] Merck & Co., Inc. - Financials - Annual Reports & Proxy, http://investors.merck.com/financials/annual-reports-and-proxy/default.aspx, (last visited March 12, 2017).

[10] *2015 Pfizer Financial Report*, http://www.pfizer.com/investors/financial_reports/financial_reports, (last visited Feb. 18, 2017.

[11] S.M. Wolfe, *Direct-to-Consumer Advertising: Education or Emotion Promotion?* New England Journal of Medicine. 2002;346(7):524–26, https://www.ncbi.nlm.nih.gov/pubmed/11844857, (last visited March 12, 2017).

[12] O.O. Commissioner, *Testimony - Regulating Prescription Drug Promotion*, July 24, 2009, https://www.fda.gov/NewsEvents/Testimony/ucm115080.htm, (last visited March 12, 2017).

consumers directly instead of relying on doctors to pass on their information to their patients. The FDA clarification report's main objective was to clarify how pharmaceutical companies can advertise their products directly to consumers, while adequately providing ways in which they can label their product and refer consumers to a toll-free number, print ads, a website or to their pharmacists or physician from where they could obtain complete information about the product's risks and benefits.[13]

Due to the clarification report from the FDA, direct to consumer advertising of prescription drugs dramatically grew from an annual total spending of $985 million dollars in 1996 to $4 billion dollars in 2005. At the same time, professional promotion costs increased from $3.7 billion dollars in 1995 to $6.7 billion dollars in 2005. This led to promotional spending growth from $11.4 billion dollars in 1996 to $29.9 billion dollars in 2005.[14] After the FDA 1997 Clarification Report, the golden age of pharmaceutical companies began to diminish, not because of lack of innovative ideas but because of changes in pharmaceutical priorities.

The golden age of pharmaceutical companies was a time of innovation for pharmaceutical companies. From 1978 to 1989, 15.6 percent of approved drugs were judged as important therapeutic gains. Internationally, from 1974 to 1994, 11% were judged as important to therapeutic and pharmacologically innovative.[15] During the mid-1990's, the Prescription Drug User Fee Act (PDUFA) was enacted which allowed the federal government to negotiate a plan with the Pharmaceutical Companies in which they would pay the FDA

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[13] Julie Donohue, *A History Of Drug Advertising: The Evolving Roles Of Consumers And Consumer Protection*, The Milbank Quarterly, Dec. 2006, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690298/ , (last visited March 12, 2017).

[14]Julie M. Donohue, Ph.D., Marisa Cevasco, B.A., and Meredith B. Rosenthal, Ph.D., *A Decade Of Direct-To-Consumer Advertising Of Prescription Drugs*, New England Journal of Medicine, 357:673-681, August 16, 2007, http://www.nejm.org/doi/full/10.1056/NEJMsa070502, (last visited March 12, 2017).

[15] D. W. Light and J. R. Lexchin. *Pharmaceutical Research And Development: What Do We Get For All That Money? BMJ* 345, Aug. 7, 2012, http://www.bmj.com/bmj/section-pdf/187604?path=/bmj/345/7869/Analysis.full.pdf, (last visited March 12, 2017).

for each drug review to help cover the operating costs at the FDA. By paying these fees, the FDA was required to approve or disallow new drug applications at a fixed period of time after each submission.[16]

This requirement has led the FDA to be too dependent on pharmaceutical companies to supply information such as company run clinical trials so that the FDA can meet the fixed period deadline. Since then, reports have concluded that between 85% to 90% of all new drugs have provided few to no clinical advantages for patients.[17] Many new safe drugs that the FDA has approved have been later categorized as too dangerous, which leads them to remove them from the market or require warnings.[18] With the FDA being tied and dependent upon analysis supplied by the drug companies they are supposed to regulate, the adverse drug reactions reported to the FDA has nearly tripled from 156,000 in 1995 to 460,000 in 2005, compared to 1985 when only 38,000 were submitted.[19] Most of the blame from the public goes to Pharmaceutical companies, with patients not realizing that they get prescribed these medications not from the pharmaceutical companies but from their trusted physicians.

Physicians are the gateway for the pharmaceutical companies to reach the patient. They determine what medication is best for the patient, while also receiving kickbacks and compensation from the pharmaceutical companies to prescribe their medication. In 2013, general payment to physicians from pharmaceutical companies was 756 million dollars. This included a total of 1,392 total companies who made payments averaging $1.8 million each to

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[16] Julie M. Donohue, Ph.D., Marisa Cevasco, B.A., and Meredith B. Rosenthal, Ph.D., "A Decade Of Direct-To-Consumer Advertising Of Prescription Drugs," *New England Journal of Medicine*, 357:673-681, August 16, 2007, http://www.nejm.org/doi/full/10.1056/NEJMsa070502, (last visited March 12, 2017).
[17] D. W. Light and J. R. Lexchin, *Pharmaceutical Research And Development: What Do We Get For All That Money?*, *BMJ* 345, Aug. 7, 2012, http://www.bmj.com/bmj/section-pdf/187604?path=/bmj/345/7869/Analysis.full.pdf, (last visited March 12, 2017).
[18] *The Risks Of Prescription Drugs*, Edited By Donald Light, Columbia University Press, 2010, https://cup.columbia.edu/book/the-risks-of-prescription-drugs/9780231146920, (last visited March 12, 2017).
[19] Id.

general physicians.[20] In 2014, $2.07 billion was given to physicians from a total of 1,580 companies, which averaged $1.7 million dollars from each company. And finally, in 2015, $2 billion was given to pharmaceutical companies from a total of 1,456 companies with an average of $1.8 million per company.[21] The total amount given to physicians from 2013 to 2015 amounted to $4.8 billion, yet the total amount pharmaceutical companies have given to teaching hospitals and research payments to hospitals from 2013 to 2015 was only $3.3 billion dollars.[22] Pharmaceutical company payments to physicians can be broken down into 7 sectors which are entertainment fees, consulting fee, compensation for services, honoraria, food and beverage, gift, and travel & lodge.[23] These seven sectors represent how pharmaceutical companies categorized their payments to physicians. The amount varies according to how well any given physician pleases the pharmaceutical company.[24]

In the case of the *Unites States of America vs. Allergan Inc*.[25], 2010, Allergen was charged with allegedly hosting numerous advisory boards designed to elicit feedback from doctors about their experience with Botox. Instead, over 200 top prescribing doctors attended the Allergen Institute, a two-day invitation marketing program held in a resort club in Newport Beach. Doctors were paid $1,500 to listen to presentations filled with promises to reward hundreds of its top injectors with consulting fees and corporate attention.[26] Attending these sponsored events and accepting funding for travel or lodging for educational purposes has been directly associated with increased

[20] *Open Payments Data – CMS*, OpenPaymentsData.CMS.gov., https://openpaymentsdata.cms.gov/, (last visited March 12, 2017).
[21] Id.
[22] Id.
[23] Id.
[24] Id.
[25] Charles Ornstein, *Allergen Paid Doctors to Attend Advisory Boards*, ProPublica, Allergen Sentencing Memo, http://www.documentcloud.org/documents/11064-allergan-sentencing-memo.html#annotation/a3, (last visited March 12, 2017).
[26] Id.

prescription rates of the sponsor's medication.[27]

In a recent study, it was shown that conference travel influenced prescribing behavior by 42% to both residents and physicians. Gifts given by pharmaceutical companies to physicians were attributed for influencing prescribing behaviors in physicians by 13% with 45% of the study group saying they would have kept the contact with the pharmaceutical company even if no gifts were given. Consumers should be made aware that doctors are used by the pharmaceutical companies to reach the consumer. Doctors are the only people who can prescribe these medications, which is the reason why the pharmaceutical companies begin to advertise to them when they are still residents. Interactions with physician residency programs is said to influence residents from 29% to 49%, while it influences physician prescribing behavior from 58% to 70%.[28] According to the available data, it shows that physicians gain most of their knowledge about a prescription drug from drug representatives, which of course, influences their prescribing behavior. While at the same time, only 26% of doctors receive knowledge of new pharmaceutical drugs from medical journals.[29]

According to author, Amanda Cochran, "It's illegal to give kickbacks to a doctor to prescribe drugs, but it is legal to give money to doctors to help promote your drug".[30] The use of kickbacks is a serious criminal matter, any payment that appears to have been made, either directly or indirectly to a client, patient, or customer for influencing a third party to purchase from, use

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[27] A. Wazana, *Physicians and the Pharmaceutical Industry Is a Gift Ever Just a Gift?* JAMA. 2000;283(3):373-380, http://www.cwbpi.com/AIDS/reports/JAMAGhostPharma.pdf, Jan.19, 2000, (last visited March 12, 2017).

[28] Id.

[29] *Getting Doctors to Say Yes to Drugs*, The Blue Cross/Blue Shield Association, 2003, http://www.thedcasite.com/Kickbacks/Getting_doctors_to_say_yes_to_drugs.pdf, (last visited March 12, 2017).

[30] Amanda Cochran, *Does Your Doctor Have Ties To Big Pharma? How You'll Be Able To Find Out*, CBS News, March 4, 2014, http://www.cbsnews.com/news/does-your-doc-have-ties-to-big-pharma-how-youll-be-able-to-find-out/, (last visited March 12, 2017).

the services of, or otherwise deal with the person who pays the kickback can be charged with a criminal offense.[31] The types of payments given to doctors to promote the drug have been proven to influence the decision of a doctor's prescription rate of that pharmaceutical company's top brand drug. One recent study has shown that physicians who accepted payments from drug companies were two to three times more likely to prescribe these top brand drug.[32] The potential problem with this practice lies with identifying whether the drugs are needed, are likely to meet the needs of the patient, or are the most cost-effective option. Doctors may prescribe the top brands (which may be the more costly option) rather than giving other alternatives such as generic drugs or alternative.

Payments to physicians from pharmaceutical companies to notice their brands happen in every city. In the city of Boca Raton alone, the total compensation doctors have received from pharmaceutical companies is $2.9 million dollars for 2015, [33] including the following:

- $1.3 million dollars for compensation for services other than consulting
- Thirty-one thousand dollars in gifts
- Seven hundred and twelve thousand dollars in travel & lodging
- One hundred and eighty-four dollars in honoraria
- Seven hundred and twelve thousand dollars in consulting fees
- Four hundred thousand dollars in food & beverage.[34]

Senator Al Franken from Minnesota recently introduced a new bill to congress called the Protecting Americans from Drug Marketing Act. The bill is

[31] Publication 535 (2015), Business Expenses. IRS, https://www.irs.gov/publications/p535/ch11, (last visited October 9, 2016).
[32] Ryann Grochowskie Jones and Charles Ornstein. *Matching Industry Payments To Medicare Prescribing Patterns: An Analysis*, Pro Publica, March 2016, https://static.propublica.org/projects/d4d/20160317-matching-industry-payments.pdf?22, (last visited March 12, 2017).
[33] *Open Payments Data – CMS*, OpenPaymentsData.CMS.gov., https://openpaymentsdata.cms.gov/ , (last visited March 12, 2017).
[34] Id.

designed to amend the Internal Revenue Code of 1986 to deny the deduction for advertising and promotional expenses for prescription drugs.[35] This bill first died in 2009 in the senate finance committee, but has been recently brought back and is awaiting review. The Protecting Americans from Drug Marketing Act states that in general, no deduction shall be allowed under this chapter for expenses relating to direct-to-consumer advertising of prescription drugs for any taxable year.[36] In order to get pharmaceutical companies back on track, we need Washington to stand up against these companies and have them pay their fair share. This is the type of change that is needed in order for pharmaceutical companies to stop taking advantage of the tax codes which costs the federal government up to $3.5 billion dollars a year.[37]

On the other hand, if we do try to prevent pharmaceutical companies from directly promoting their products to physicians, it could potentially violate the *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* case in which the US Supreme court found that, "A State may not suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of the information's effect upon it disseminators and its recipients".[38] According to the result of the case, states cannot prevent pharmaceutical companies from advertising. It was referred to as a form of taxation, which is a form of money demanded by a government or burdensome charge that may prevent many smaller pharmaceutical companies from advertising their product because of the burden this new tax would place on them.

In the 1950's Democratic Senator Estes Kefauver, Chairman of the United

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[35] *Protecting Americans From Drug Marketing Act*, Senate Bill 2623, U.S. 114Th Congress (2015-2016), https://www.congress.gov/bill/114th-congress/senate-bill/2623/text, (last visited March 12, 2017).

[36] Id.

[37] *Sen. Franken Introduces Bill To End Tax Breaks For Drug Company Advertising*, U.S. Senate Al Franken, https://www.franken.senate.gov/?p=press_release&id=3384, Mar. 3, 2016, (last visited March 12, 2017).

[38] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (May 24, 1976), https://www.law.cornell.edu/supremecourt/text/425/748, (last visited March 12, 2017).

States Senate's Anti-Trust and Monopoly Subcommittee investigated pharmaceutical companies and found that:

- Twenty four percent of their revenue went to promotion.
- Costs and prices were extravagantly increased by large expenditures in marketing
- Most of the industry's new products were no more effective than established drugs on the market.[39]

Sixty years later not much has changed. Today, pharmaceutical companies only contribute 7.2% of their total revenue to Research & Development while 28.8% went on marketing and administrative. Adverse drug reactions reported to the FDA has nearly tripled from 156,000 in 1995 to 460,000 in 2005. Since 1996 advertising of prescription drugs has jumped from 985 million dollars to $4 billion dollars in 2005, Professional promotion costs increased from $3.7 billion dollars in 1995 to $6.7 billion dollars in 2005, and promotional spending growth jumped from $11.4 billion dollars in 1996 to $29.9 billion dollars in 2005. In the end, Johnson & Johnson, Merck & Co., and Pfizer have accounted for $146 billion dollars in marketing while only contributing $70 billion in research and development. These three companies are the largest global pharmaceutical companies with millions of dollars in net earnings every year, yet they continue to put profits and promotions over human health.

39 Marc Gagnon and Joel Lexchin, *The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States*, (2008), PLoS Medicine 5(1): e1. doi:10.1371/journal.pmed.0050001, http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0050001, (last visited April 6, 2017).

## *A Case Review Concerning the Effectiveness of Provisions of the Individuals with Disabilities Education Act*

by Cameron Ryan

On behalf of their daughter, the E.F. Fry family sued Napoleon Community school for damages citing emotional humiliation, which was not covered under the Individuals with Disabilities Education Act (IDEA), but instead was covered under the Americans with Disabilities Act (ADA).[1] However, the ruling of the U.S. Court of Appeals for the sixth circuit found their educational demands to be protected under the IDEA, and thus, they needed to go through the administrative system of exhaustion which is required under the IDEA. The Supreme Court heard oral arguments and questioned why the parties were even before them, noting that the statutes were clear and had to be followed, but that perhaps the larger question was whether the parties were seeking assistance for their daughter who suffered from cerebral palsy since birth, or were they seeking damages only? If they were suing under the ADA for damages, were they perhaps seeking to improve a system designed to improve quality of life for those with disabilities, when their daughter had only experienced humiliation, or were they seeking a better program for their daughter in the future under the IDEA. In both cases, free education and the quality of care might be the final objective.

For more than half of the past century, the U.S. federal government has greatly expanded civil rights for everyone, especially protection for the disabled, either physically, medically, or mentally. Yet with these new laws, it can be confusing for people to identify which law they should use when pursuing legal actions. Under the IDEA, they could choose to secure education services, or if they sued under the ADA, they could sue for damages. The case of *Fry v. Napoleon Community Schools*[2] represents a challenge for the normal issues related to selecting the legal theory upon which a claim is based because in this case, the parties are seeking damages on behalf of a young girl who no longer attends the school where she suffered emotional damages and the

[1] 580 U.S. ____ (2017), (on appeal from *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. June 12, 2015).
[2] Id.

question is whether a claimant must exhaust all administrative remedies before seeking damages when the issue is not whether free education opportunities were made available.

Yet the School system defendant demanded that the claimant exhaust the IDEA hearings as required by the statute in order to establish their claim and in order to allow the defendant School system to defend their actions by proving they supplied all she needed by providing a human being for her aid. The claimant alleged emotional abuse because the school system, refused to allow the child to have her service dog with her. The service dog assisted the child to open doors, turn on lights, pick up dropped items, remove her coat, and help her balance when she moved from her walker onto a chair or the toilet.[3] The claimant never alleged a denial of access to educational services, but rather alleged emotional damages due to the denial of access to her service dog.

**The Focus of the Frys'**

Throughout the trial, the defendant referenced the need to go through the exhaustion hearings under the IDEA even though the issue at trial concerns damages under the ADA. The question is whether IDEA proceedings must be completed first before any other issue can be addressed.[4] The claimant, E.F. Fry was diagnosed with cerebral palsy at an early age[5] which creates mobility issues for her. She is suing the Napoleon Community School for emotional damages based upon allegations of being watched by the school's lawyers to make sure she used her dog to assist in her for things like going to the bathroom. Furthermore, when the claimant's parents sought permission for the service dog to join the claimant in kindergarten, the officials at Ezra Eby Elementary School refused the request claiming they provided human

[3] Id.
[4] *Fry v. Napoleon Community Schools*, 73, 73 (2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-497_4g15.pdf (last visited Jan 19, 2017).
[5] *Fry v. Napoleon Community Schools*, Oyez, https://www.oyez.org/cases/2016/15-497 (last visited Jan 19, 2017).

assistance and therefore, the claimant did not need a dog. [6]

The claimant alleged that the school put her in embarrassing situations and denied her the comfort of her service dog. It is not hard to imagine such damages occurred. But under the IDEA in this specific circumstance, the statute would not apply since they were only seeking emotional damages for putting her in such a humiliating position.[7] This leads to the ADA, which does have these protections and allows for tort claims. But does that mean the IDEA is obsolete if its hearing process isn't exhausted?

In the Amicus Curiae Brief [8]of the Honorable Lowell Weicker, Jr., petitioning for Fry, Weicker cited *Smith v. Robinson*[9] where the court found that the IDEA doesn't preempt lawsuits under the Handicapped Children's Protection Act (HCPA), which was passed in order to fix problems with its predecessor, the Education of the Handicapped Act (EHA) by allowing families to make the choices that are best for their children and, where necessary, to file suit to redress violations of their rights pursuant to disability statutes and other laws.[10] The HCPA is intended to allow broader rights for families to redress wrongs committed against their disabled children, meaning it takes precedence over identical claims brought under other laws in order to

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[6] *Fry v. Napoleon Community Schools* , No. 15–497. Argued October 31, 2016—Decided February 22, 2017, Pg. 10, https://www.supremecourt.gov/opinions/16pdf/15-497_p8k0.pdf (last visited March 2, 2017).

[7] Public Law 108–446, 108th Congress An Act, E:\Publaw\Publ446.108, parentcenterhub.org (2004), http://www.parentcenterhub.org/wp-content/uploads/repo_items/PL108-446.pdf (last visited Jan 19, 2017).

[8] *Fry v. Napoleon Community Schools*, Brief Of Amicus Curiae Hon. Lowell P.Weicker, Jr. In Support Of Petitioners, NO. 15-497 ( S. Ct. 2016), http://www.scotusblog.com/wp-content/uploads/2016/09/15-497-amicus-petitioner-weicker.pdf. (last visited March 2, 2017).

[9] 468 U.S. 992 (1984).

[10] *Fry v. Napoleon Community Schools*, Brief Of Amicus Curiae Hon. Lowell P. Weicker, Jr. In Support Of Petitioners, NO. 15-497 ( S. Ct. 2016), http://www.scotusblog.com/wp-content/uploads/2016/09/15-497-amicus-petitioner-weicker.pdf. (last visited March 2, 2017).

obtain relief. The HCPA was passed by Congress in order to give parents the right to give input for their child's Individualized Education Program (IEP), and if the needs are not met, then the parents can file a lawsuit.[11]

Yet, the Sixth Judicial Circuit Court of Appeals asserted that petitioners under the IDEA, must go through the administrative hearings process, or it would weaken the IDEA, and circumvent Congress' intention with the HCPA. It is generally accepted that with the passage of these laws, Congress intended to give children with disabilities, a free, and appropriate public education. Yet, prior to the Fry case, a significant gray area existed where the procedural requirements were uncertain.

**The Focus of Congress**

Before the HCPA was the EHA which, as described by Ernest L. Boyer in his essay, "Public Law 94-142: A Promising Start?", that it is a set of "regulations" that require schools to give an Individual education plan, or IEP as it is commonly called, and that at the public's expense, schools would provide an education to disabled students with an appropriate use of federal funds.[12] However, later in the article, Boyer acknowledged that this could be changed in the future. [13] By the time of *Smith v. Robinson*, as the Hon. Weiker Jr. wrote, "The EHA would … permit plaintiffs to bring substantively identical claims under other laws to get to the benefit of additional remedies such as damages and attorney's fees."[14]

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[11] *Handicapped Children's Protection Act Becomes Law*, The Leadership Conference on Civil and Human Rights (2017), http://www.civilrights.org/monitor/august1986/art5p1.html?referrer=https://www.google.com/ (last visited Jan 19, 2017).

[12] Ernest Boyer, *Public Law 94-142: A Promising Start?*, (1979), http://www.ascd.org/ASCD/pdf/journals/ed_lead/el_197902_boyer.pdf (last visited Jan 19, 2017).

[13] Id.

[14] *Fry v. Napoleon Community Schools*, Brief Of Amicus Curiae Hon. Lowell P. Weicker, Jr. In Support Of Petitioners, NO. 15-497 ( S. Ct. 2016), http://www.scotusblog.com/wp-content/uploads/2016/09/15-497-amicus-petitioner-weicker.pdf ,(last visited Jan 19, 2017).

With the HCPA, parents now have a direct say in the matters of their children's IEP.[15] The Fry's tried going through the administrative process, though not the IDEA. to implement their request that the claimant's service dog be allowed to assist her at school, and when the school refused, they removed their child and began home schooling her. It was the final act of refusal that prompted the law suit for emotional distress damages.

This case allows the circumvention of provisions of the IDEA when the needs of the student are not dealt with appropriate under the IDEA protocols. However, the IDEA only protects students looking for physical relief through an administrative process of hearings. This is included along with Section 504 of the Rehabilitation Act and the Americans with Disabilities Act[16] which protects children from being denied an evaluation, or extremely prolonging it across the reasonable timeline to evaluate the student for disabilities.[17] Section 504 also includes a provision that precludes schools from paying for private schooling for a former student with a disability under FAPE.[18] But it was the egregious actions of the school when they made the claimant go to the bathroom with the stall door open and four adults watching that contributed to the emotional distress.[19] With the Fry case, the Supreme Court was required to balance competing needs, either rendering the IDEA unenforceable by allowing lawsuits for parents that could damage the economic stability of schools, or meet the needs of the child as intended by the IDEA.

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[15] *Handicapped Children's Protection Act Becomes Law*, The Leadership Conference on Civil and Human Rights (2017), http://www.civilrights.org/monitor/august1986/art5p1.html?referrer=https://www.google.com/ (last visited Jan 19, 2017).

[16] 29 U.S.C. § 794 (Section 504).

[17] *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, www2.ed.gov (2016), https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf (last visited Jan 19, 2017).

[18] Id.

[19] *Fry v. Napoleon Community Schools*, 73, 73 (2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-497_4g15.pdf (last visited Jan 19, 2017).

**The Supreme Court's Attentions**

Justice Kagan questioned counsel about the nature of his argument having two sides: one which constitutes seeking only emotional damages, while not making a claim they were denied a fair and appropriate education.[20] Justice Kagan opined, "[T]his case is the intersection of the two… either one of those things would mean that you don't have to exhaust."[21] Rather, the court found that it was not a requirement that there be a denial of a FAPE to a disabled child in order to seek damages. Of course, suing the school would hurt its financial resources and therefore its processes, but in seeking a change of the school's IEP for their daughter, the school inflicted unneeded and disquieting embarrassment upon a disabled child. The pathos is powerful, and the court responded positively to the claimant's argument.[22]

Justice Breyer suggested that, "Under ordinary exhaustion principles, you have to exhaust and exhaustion would be futile."[23] The court suggests that if an IED change isn't what the claimant wants, and if the defendant and claimant agree that a FAPE was provided, then they can file the lawsuit for damages alone.[24] It seemed that the court embraced the public policy behind the passage of the IDEA and looked toward the future application of their interpretation in order to accomplish that identified public policy purpose. [25]

**The Very Narrow Road to Damages**

The IDEA has done a great deal of good for students with disabilities. The National Center for education statistics show that 6,464 human beings, ages three to 21, are served by the IDEA. So, something within the system works and is used by the American public, and therefore needs to be protected as a

[20] Id.
[21] *Fry v. Napoleon Community Schools*, 73, 73 (2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-497_4g15.pdf (last visited Jan 19, 2017).
[22] Id.
[23] Id.
[24] Id.
[25] Id.

useful law. There needs to be an amendment to the ADA to allow for damages as a separate claim. Asking for something like a change in the plaintiff's IEP, could still require exhausting the IDEA hearings requirements. If these provisions are identified as an amendment to the statute it would offer clarification and establish a firm legal pathway to sue for things like intentional infliction of emotional distress. By doing this, it would allow for cases almost identical to the E.F. Fry case to more easily be resolved. The concept of future damages is still questionable because if the FAPE can be adapted to the needs of the child, the situation should have an informal resolution. However, if the plaintiff is continuously hurt throughout their academic career, they would need the IDEA's protections. Now with this proposal, any debate in Congress concerning amendments to IDEA could also trigger debate about similar issues the HCPA and ADA, which could require consideration of a new kind of relief.

# The Demoralization of the U.S. Judicial System Through the Promotion of Private Prison Industries

by Ashley Carrie

## Introduction

In the United States, the prison system has evolved into a business, which has corrupted our Justice System. "The American system of justice is being replaced by an even more flawed and insidious form of mass punishment based upon profit and expediency."[1] Private prisons are used to alleviate the economic burden of the rising prison population on the government. Many conflicting views are held on the pros and cons of the privatization of prisons. The benefits of using Private Prison Industries are that the state government saves tax dollars, gives prisoners work to pay their costs of living and maintain prisons, and the work they do while in prison is used to rehabilitate the prisoners. A study done in 2007 examined the role of privatization on the cost of government-provided services. "Our findings suggest that if the "average" state in that group were to introduce the use of private prisons, the potential savings for one year in the Department of Corrections expenditures for public prisons could be approximately $13 to $15 million for that particular hypothetical state."[2] Despite the cost-benefit, opponents believe that private prison has demoralized the U.S Justice System and negatively affected American society through mass incarnation.

The movement toward privatizing prisons began in the United States in the1980s with the Correction Corporation of America, created because of the

[1] John Whitehead, *Jailing Americans for Profit: The Rise of the Prison Industrial Complex*, Huffington Post, April 10, 2012, http://www.huffingtonpost.com/john-w-whitehead/prison-privatization_b_1414467.html, (last visited April 11, 2017).
[2]James F. Blumstein, Mark A. Cohen, Suman Seth, *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons*, December 2007. Vanderbilt Law and Economics Research Paper No. 03-16; Vanderbilt Public Law Research Paper No. 03-05, https://ssrn.com/abstract=441007 or http://dx.doi.org/10.2139/ssrn.441007, (last visited April 11, 2017).

increase in prison populations.[3] The increase in the prison population gave rise to the cost of operating prisons.[4] It was viewed as a waste of tax payers' dollars and became an issue for federal and state governments. As a solution, the state governments made contracts with private companies, giving them the right to make and maintain prisons. A business agreement between the government and private prisons that guarantees the capacity of a prison will be filled to a certain percentage point compromises the integrity of the judicial system. In the Public Interest (ITPI), a Washington, D.C. based research and policy group on public services, reported in September 2013 research project[5] that it found so-called 'bed guarantees' in around 65% of the more than 60 private prison contracts it analyzed, including contracts from Texas, Ohio, Colorado and Florida. The bed guarantees, or "lockup quotas," ranged from 70% minimum occupancy in at least one California facility to 100% occupancy at three Arizona prisons. The most common bed guarantee was 90%."[6] In order to meet the conditions of these contracts, laws were created, not based on the well-being of society, but in order to meet the conditions of these contracts and to ensure profit for private prisons. These agreements create an incentive to put citizens behind bars at a high rate, thus leading to mass incarnation. The business contract creates an incentive for the judicial system to imprison individuals in order to uphold their agreement or to meet their quotas. The privatization of prisons allows big businesses to manage some prisons, in order to use prisoners for cheap labor.

The rising concerns about how private prison industries are negatively affecting the judicial system. Here are some of the observations, private prison industries have negatively affected society by increasing the prison population

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[3] *Private Prisons are Back*, Corrections Project, http://www.correctionsproject.com/corrections/pris_priv.htm, (last visited April 11, 2017).
[4] Id.
[5] Joe Watson, *Report Finds Two-Thirds of Private Prison Contracts Include "Lockup Quotas*, Prison Legal News, July 31, 2015, https://www.prisonlegalnews.org/news/2015/jul/31/report-finds-two-thirds-private-prison-contracts-include-lockup-quotas/, (last visited April 11, 2017).
[6] Id.

for profit. In one study sponsored by the Sentencing Project, author Cody Mason, observed, "Finally, private prison companies' dependence on ensuring a large prison population to maintain profits provides inappropriate incentives to lobby government officials for policies that will place more people in prison. This is evidenced by the creation and coordination of model legislation through conservative lobbying groups, as well as in the political contributions and lobbying efforts of individual companies. This effort to increase reliance on incarceration comes at a time where America's rate of imprisonment is the highest in the world and when the prison population is far beyond the point of diminishing returns in terms of public safety."[7]

The United States has the largest prison population in the world, "U.S. Statistics reveal that the United States holds 25% of the world's prison population, but only 5% of the world's people."[8] Powerful politicians and businesses use policies and laws to guarantee a large prison population for labor. "Policies reveal how private prison companies (PPCs) use political campaign donations, political lobbyists and relationships with government officials to increase their profits by promoting policies that result in more people being incarcerated."[9] Because of these conflicting interests, one might wonder if the Judicial System has become more concerned about protecting the interest of private prison industries, rather than promoting justice. As author Vick Peláez surmised, "The passage of laws that require minimum sentencing, without regard for circumstances. . . and. . . a large expansion of

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[7] Cody Mason, *Too Good To Be True, Private Prisons in America*, January 2012, The Sentencing Project, http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf.

[8] Vick Peláez, *The Prison Industry in the United States: Big Business or New Form of Slavery?*, Global Research, March 10, 2008 ,http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289, (last visited April 11, 2017).

**[9]** Matthew Clarke, *Study Shows Private Prison Companies Use Influence to Increase Incarceration*. Prison Legal News, (August 22, 2016), https://www.prisonlegalnews.org/news/2016/aug/22/study-shows-private-prison-companies-use-influence-increase-incarceration/, (last visited April 11, 2017).

work by prisoners creating profits [makes one wonder if ] " that motivates the incarceration of more people for longer periods of time." [10] Corporate control of prisons has demoralized the judicial system. It hinders them from providing impartial and unbiased decisions.

**Authority**

Private Prison Industries have been described as the rebirth of slavery and Jim Crow. After the Civil War, the South wanted to preserve the slave labor and hinder Reconstruction, the period after the Civil War to promote and ensure slaves' freedom and rights. They created laws, such as convict leasing. Black Codes became legalized slavery. "After the 1861-1865 Civil War, a system of hiring out prisoners was introduced in order to continue the tradition of slavery."[11] This was made possible through enforcing rules that were only applied to African Americans called the black codes. African Americans in the South were sent to prison if they violated black codes. The black codes are described as having the primary purpose of restricting blacks' labor and activity.[12] These policies were put in place in order to reverse the equalizing effects of the Civil War and to keep Reconstruction from being implemented in the South, which left African Americans economically dependent. "After reconstruction, a majority of whites during this time believed newly freed African Americans were too lazy to work, which urged legislators to pass the black codes. This was essentially a system of white control. These codes varied from state to state, but were rooted in slavery, and they foreshadowed Jim Crow laws to come."[13]

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[10] Vick Peláez, *The Prison Industry in the United States: Big Business or New Form of Slavery?*, Global Research, March 10, 2008, http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289, (last visited April 11, 2017).

[11] Id.

[12] *Black Codes*, History.com, 2010, http://www.history.com/topics/black-history/black-codes, (last visited April 11, 2017).

[13] Aristotle Jones, *The Evolution: Slavery to Mass Incarceration*, The Huffington Post, Oct. 6, 2016, http://www.huffingtonpost.com/entry/the-evolution-slavery-to-mass-incarceration_us_57f66820e4b087a29a54880f, (last visited April 11, 2017).

The Modern Prison System has similar characteristics that existed in slavery and Jim Crow. "This feat has been achieved largely by appealing to the racism and vulnerability of lower-class whites, a group of people who are understandably eager to ensure that they never find themselves trapped at the bottom of the American totem pole. This patter, dating back to slavery, has birthed yet another racial caste system in the United States: mass incarnation."[14]

Refusing constitutional rights to prisoners allows for a corrupt justice system. The Fifth Amendment in the U.S. Constitution addressed the rights of prisoners and states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury,… nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[15] The takings clause of the Fifth Amendment implies labor, if interpreted as a property right, cannot be taken without due process of law. Allowing private prisons to exploit prison labor by paying them from 12 cents to 40 cents an hour[16] suggests that once a citizen becomes a prisoner, they forfeit their constitutional rights. Private prison industries are using prison labor under the theory that they are government-property. In a study conducted by the ACLU, they noted, "In 2010, the two largest private prison companies alone received nearly $3 billion dollars in revenue, and their top executives, according to one source, each received annual compensation packages worth well over $3 million."[17]

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[14] Michelle Alexander, *The New Jim Crow: Mass Incarnation and the Age of Colorblindness*, The New Press, 2010, https://genderlawjustice.berkeley.edu/wp-content/uploads/2012/03/The-New-Jim-Crow.pdf, (last visited March 30, 2017).
[15] U.S. Constitution, Amendment V.
[16] Prison Policy Initiative Section III: *The Prison Economy*, https://www.prisonpolicy.org/prisonindex/prisonlabor.html, (last visited April 11, 2017).
[17] *Banking on Bondage: Private Prisons and Mass Incarceration*, The American Civil Liberties Union, Nov. 2, 2011, https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf. (last visited April 11, 2017).

Some argue that the Constitution permits exploitation of prisoners' labor because they are stripped of their rights, "Today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination-employment discrimination, housing discrimination, denial of the right to vote, denial of education opportunity, denial of food stamps and other public benefits, and exclusion from jury service- are suddenly legal."[18]

Then in the Thirteenth Amendment we have, "Neither slavery, nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction."[19] The Fourteenth Amendment states, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."[20]

**Analysis**

Though it seems that our country should be far removed from injustices that occurred after the Civil War, history is repeating itself through the current privatization of prisons. Drug charges and unfair rendering of jail time have become the Black Codes of this century. African Americans make up the majority of the population in prisons. "Although black people make up just 13 percent of the overall population, they account for 40 percent of U.S prisoners."[21] According to the Bureau of Justice Statistics (BJS), black males are incarcerated at a rate "more than 6.5 times that of the white males and 2.5 that of the Hispanic males and black females are incarcerated at approximately

[18] Michelle Alexander, *The New Jim Crow: Mass Incarnation and the Age of Colorblindness*, The New Press, 2010, https://genderlawjustice.berkeley.edu/wp-content/uploads/2012/03/The-New-Jim-Crow.pdf, (last visited March 30, 2017).
[19] U.S. Constitution, Amendment XIII.
[20] U.S. Constitution, Amendment XIV.
[21] Rania Khalek, *WORLD 21St-Century Slaves: How Corporations Exploit Prison Labor*, AlterNet, July 21, 2011, http://www.alternet.org/story/151732/21st-century_slaves%3A_how_corporations_exploit_prison_labor, (last visited April 11, 2017).

three times the rate of white females and twice that of the Hispanic females." [22] And in the ACLU Report, it was noted that between 1970 and 2005, the number of citizens incarcerated grew by 700 percent.[23] And it must be noted that studies have shown that the level of violence against inmates in private institutions has escalated as well as numerous instances of unsafe living conditions being found in private prisons.[24]

**Conclusion**

The fifth, thirteenth, and fourteenth amendments of the U.S. Constitution are in need of interpretation and revision. The issue with the emergence of private prison industries is that it injects potential bias into the judicial system The current interpretation of these amendments allow the government and private prison industries to compel and control prisoners' labor. This affects the justice system because verdicts may be based upon the need to meet quotas in order to comply with government contracts with the private prison industries, insuring certain profit levels for the private prisons. The Constitution seems to contemplate incarnating citizens to deprive them of their rights once they become prisoners. The Fourteenth Amendment protects prisoners because it makes no exceptions, all people deserve equal treatment under the law. Private prison industries creates unequal and biased sentencing of criminals to support the continuation and profit of its industries.

According to an article in the Huffington Post, "Prison privatization is neither fiscally responsible nor in keeping with principles of justice."[25] The article continues by saying, "It simply encourages incarceration for the sake of profit.

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[22] Id.

[23] *Banking on Bondage: Private Prisons and Mass Incarceration*, The American Civil Liberties Union, Nov. 2, 2011, https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf, quoting Public Safety Performance, Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011, 11, (last visited April 11, 2017).

[24] Id.

[25] John Whitehead, *Jailing Americans for Profit: The Rise of the Prison Industrial Complex*, Huffington Post, April 10, 2012, http://www.huffingtonpost.com/john-w-whitehead/prison-privatization_b_1414467.html, (last visited April 11, 2017).

It is a justice system based on increasing the power and wealth of the corporate state."[26] Another interpretation of these Amendments is needed; the amendments should be interpreted in a way that is consistent with other laws and rights of the United States. When these amendments were made, it was used to still force African Americans to work through convict leasing. An updated interpretation of these Constitutional Amendments should clearly state the rights and protections of prisoners. Also, non-violent offenders and those with drug charges should receive a lesser sentence. Though the prisoners are viewed as criminals, it should not take away from their worth as humans and as citizens of the United States, nor reduce them to involuntary servitude.

[26] Id.

## Author Biographies

**Renzo Broggi** is a Spanish Language/ Political Science double major graduating this Spring. Renzo has spent the past 3 years of his undergraduate career serving as an ambassador of the Diplomacy Program, head legal assistant at a local law firm, a Site Leader/Trip Coordinator for the Alternative Spring Break Program, studied abroad in Costa Rica during the summer and contributed as an Editorial Board member and current Editor in Chief of the Undergraduate Law Journal. Upon graduation, Renzo plans on taking two gap years to explore his professional and business interests by continuing to work in a legal environment as well as exploring other options before ultimately applying to law school.

**Michael Cairo** is a senior studying Finance who currently serves as the Student Body President and a member of the FAU Board of Trustees. He has served in several leadership positions in Student Government such as Police Liason and House Speaker Pro-Tempore. He is a member of the Pi Kappa Alpha fraternity and the FAU chapter of the NAACP. He is deeply passionate about higher education accessibility and affordability, criminal justice reform, youth civic engagement and cybersecurity.

**Stefania Cardenas** is a business management major with a minor in economics and business law. Expecting to graduate in May 2018, Stefania looks forward to attending law school shortly after graduation in her pursuit of a career in law.

**Ashley Carrie** is a third year at Florida Atlantic University, studying Accounting and History. Future goals are to become a CPA and a business lawyer. Interests include the Privatization of Prisons and how a business mentality of making profit has affected our judicial and prison systems, and other areas and institutions in the United States.

**Michael Dewing** is a veteran student currently building a for profit business model addressing fundamental changes in financial markets, banking, and commercial investments, while aligning the intellectual property rights with a

limited liability corporation.

**Nora Douglas** is a junior at Florida Atlantic University studying Political Science and Linguistics. She has been an editor since her early days in high school and made extra money through proofreading peers' work. Now, she is glad to be an editor with the Undergraduate Law Journal because it's a valuable publishing opportunity for undergraduates to develop themselves professionally. On campus, she is a senator in Student Government and is involved with creating legislation for the student body. Currently, she is interning in Washington D.C. in the U.S. House of Representatives and looks forward to the rest of a productive semester.

**Alina Marian** moved to United States of America from Romania, after having obtained a bachelor degree in law studies. In 2015 she enrolled at Florida Atlantic University, seeking a bachelor degree in accounting. With a graduation date of August, 2017, Alina's future plans include obtaining her CPA license, a master degree in taxation, as well as beginning her career in tax public accounting.

**Abel Roman** is an Accounting major and a Business Law minor at Florida Atlantic University, and will pursue his CPA license beginning this summer.

**Ryan Cameron** is an English major that will be graduating in Spring 2019. He will be serving on the Editing Board of the Undergraduate Law Journal this coming year.

# The Faces of the Undergradaute Law Journal