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# DOUBLING DOWN ON A BILLION DOLLAR BLIND SPOT: WOMEN BUSINESS OWNERS AND TAX REFORM

CAROLINE BRUCKNER*

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## I. INTRODUCTION

In 1976, the U.S. Census Bureau ("Census") released its first ever report on the state of women's business ownership in the United States ("U.S.") that counted 402,025 women-owned U.S. firms representing only 4.6 percent of all firms and 0.3 percent of all U.S. business receipts, as of

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1972.[1] Concerned by these low figures, U.S. Commerce Secretary, Dr. Juanita Kreps, a labor economist, advised President Carter to investigate the circumstances behind the numbers.[2] On August 4, 1977, Carter issued a memorandum creating an Interagency Task Force on Women Business Owners ("Task Force") to (i) identify and assess the adequacy of existing data on women entrepreneurs; and (ii) assess current federal programs and practices that have the effect of discriminating against women entrepreneurs or placing them at a competitive disadvantage.[3]

In November 1977, the Task Force established its membership and got to work.[4] High-level representatives from eight federal agencies served on the Task Force and contributed to its findings.[5] In conducting its review, the Task Force not only identified the many challenges women entrepreneurs face, but also focused on small businesses, "since this is the business sector in which most women-owned businesses are concentrated."[6] While recognizing that minority women business owners were subject to "double barriers of racism and sexism," the Task Force primarily attacked sexism, rationalizing that alleviating this significant problem would aid in the discrimination faced by minority women.[7] As part of this exercise, the U.S. Department of Treasury ("Treasury")

1. CAROLINE BRUCKNER, KOGOD TAX POLICY CTR. REPORT, BILLION DOLLAR BLIND SPOT: HOW THE U.S. TAX CODE'S SMALL BUSINESS EXPENDITURES IMPACT WOMEN BUSINESS OWNERS 6 (2017) [hereinafter BDBS], https://www.american.edu/kogod/research/upload/blind_spot_accessible.pdf (citing INTERAGENCY TASK FORCE ON WOMEN BUS. OWNERS, THE BOTTOM LINE: UNEQUAL ENTERPRISE IN AMERICA 32 (1978) [hereinafter THE BOTTOM LINE]) (explaining that the 1972 Census data served as a "valuable benchmark" despite issues with methodology and age).

2. BDBS, *supra* note 1, at 6 (citing BURTON I. KAUFMAN, THE CARTER YEARS 273 (2006)).

3. *Id.* (citing THE BOTTOM LINE, *supra* note 1, at 3); *see also* Memorandum on Task Force on Women Business Owners to the Sec'y of the Treasury, the Sec'y of Def., the Sec'y of Labor, the Sec'y of Commerce, the Sec'y of Health, Educ., and Welfare, the Adm'r of Gen. Servs. Admin., the Adm'r of Small Bus. Admin. 1429 (Aug. 4, 1977).

4. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 3).

5. *Id.* (citing THE BOTTOM LINE, *supra* note 1, at 3); U.S. DEP'T OF COMMERCE, WOMEN BUSINESS OWNERSHIP: AN ANNOTATED BIBLIOGRAPHY 10 (1986) [hereinafter ANNOTATED BIBLIOGRAPHY].

6. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 3, 32, 34); ANNOTATED BIBLIOGRAPHY, *supra* note 5, at 5.

7. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 3–4); Jimmy Carter, The First 18 Months: A Status Report of the Carter Administration Action on International Women's Year Resolutions (Sept. 4, 1978), https://www.jimmycarterlibrary.gov/digital_library/sso/148878/90/SSO_148878_090_12.pdf (noting that minority women face the same barrier of sexism as all women and all recommendations of the National Plan of Action shall apply "equally and fully to minority women").

prepared a report for the Task Force (the "1978 Treasury Study") that "concentrated on small business because the majority of women-owned businesses are small businesses" and focused its work on "credit and capital formation as well as other financially-related issues such as insurance, bonding and taxation."[8]

With respect to its assessment of the impact of tax on women-owned firms, the 1978 Treasury Study noted at the outset that tax laws were "sex neutral" and focused its work on describing tax provisions impacting small business.[9] Fundamentally, the 1978 Treasury Study assumed that "[o]f course, taxation is not sex-specific. A small business is taxed as a business, not as female- versus male-owned. As a consequence, any changes in tax laws to benefit small businesses would benefit men more than women, since so few businesses are owned by women."[10] And that was that.

Since then, women-owned firms, which Census defines as businesses in which women own 51 percent or more of the equity or stock,[11] have grown to approximately thirteen million businesses representing 42 percent of all U.S. firms as of 2019.[12] During this period of extraordinary growth, Congress has supported women's business ownership by passing legislation designed to eliminate discriminatory lending practices and promote federal contracting and counseling opportunities for women business owners.[13]

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8. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 62, 66–67); U.S. DEP'T OF TREASURY, CREDIT AND CAPITAL FORMATION: A REPORT TO THE PRESIDENT'S INTERAGENCY TASK FORCE ON WOMEN BUSINESS OWNERS, at v (1978) [hereinafter 1978 TREASURY STUDY], https://fraser.stlouisfed.org/title/credit-capital-formation-256 (last visited Apr. 21, 2020).

9. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 17); Telephone Interview with Theodora K. Watts, author of 1978 Treasury Report (May 15, 2017) (on file with author).

10. 1978 TREASURY STUDY, *supra* note 8, at 86. In fact, the 1978 Treasury Study ultimately concluded that women-owned firms had even lower income than small businesses generally, and as a result, would not significantly benefit from major tax reform, but that tax simplification could lower costs of tax compliance. *Id* at 96.

11. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS AND SELF-EMPLOYED PERSONS (SBO) (2012), https://www.census.gov/programs-surveys/sbo/technical-documentation/methodology.html (last visited Apr. 14, 2020).

12. AMERICAN EXPRESS, THE 2019 STATE OF WOMEN-OWNED BUSINESSES REPORT 3 (2019) [hereinafter 2019 AMERICAN EXPRESS REPORT], https://about.americanexpress.com/files/doclibrary/file/2019-state-of-women-owned-businesses-report.pdf.

13. *See* BDBS, *supra* note 1, at 6 n.13 (citing Equal Credit Opportunity Act of 1974, Pub. L. No. 93–495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. §§ 1691–1691f) (outlawing discrimination based on sex or marital status in credit determinations); Women's Business Ownership Act of 1988, Pub. L. No. 100–533, 102 Stat. 2689 (1988) (supporting women small business ownership and establishing the National

At the same time, Congress has regularly worked to enhance the U.S. Internal Revenue Code as amended (the "IRC" or the "Code") to benefit small businesses on a number of fronts.[14] Most recently, in December 2017, Congress passed major tax reform legislation (commonly referred to as the "Tax Cuts and Jobs Act" or "TCJA"),[15] which policymakers intended to provide, *inter alia*, "tax relief for middle-class families . . . [and] tax relief for businesses, especially small businesses."[16] Specifically, policymakers intended, *inter alia*, to "enhance unprecedented expensing for

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Women's Business Council); Women's Business Development Act of 1991, Pub. L. No. 102–191, 105 Stat. 1589 (1991) (championing women-owned business with federal contracting and women's business centers); Women's Business Centers Sustainability Act of 1999, Pub. L. No. 106–165, 113 Stat. 1795 (1999) (encouraging women-owned businesses federal contracting and reauthorizing Women's Business Program); SBA Reauthorization Act of 2000, Pub. L. No. 106–554, 114 Stat. 2763 (2000) (authorizing the Women-Owned Small Business Federal Contract Assistance Program, which is a set-aside program for women-owned businesses for federal contracts); Small Business Jobs Act of 2010, Pub. L. No. 111–240, 124 Stat. 2504 (2010) (assisting women's business centers)).

14. BDBS, *supra* note 1, at 6 n.14 (citing Miscellaneous Revenue Act of 1980, Pub. L. No. 96–605, 94 Stat. 3521 (allowing taxpayers to amortize startup costs over a period of 5 years); Economic Recovery Tax Act of 1981, Pub. L. No. 97–34, 95 Stat. 172 (1981) (replacing the 1958 small business expensing provision with a $5,000 maximum spending allowance); Tax Reform Act of 1986, Pub. L. No. 99–514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of 26 U.S.C.) (overhauling the U.S. tax code for the first time since 1954); Omnibus Reconciliation Act of 1993, Pub. L. No. 103–66, 107 Stat. 312 (1993) (raising small business expensing allowance to $17,500 and establishing capital gains exclusion for investments into qualified small business manufacturing corporations); American Jobs Creation Act of 2004, Pub. L. No. 108–357, 118 Stat. 1418 (2004) (amending the Internal Revenue Code of 1986) (allowing taxpayers to deduct up to $5,000 in startup costs in the year the business begins); Small Business Jobs Act of 2010, Pub. L. No. 111–240, 124 Stat. 2504 (2010) (increasing the expensing limits for Sec. 179; temporarily increased the amount of startup costs a taxpayer could deduct from $5,000 to $10,000; temporarily increased to 100% the exclusion from tax the capital gains from investments into qualified small business stock under Sec. 1202); Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114–113, 129 Stat. 2242 (making permanent 100 percent exclusion from tax the capital gains from investments into qualified small business stock under Sec. 1202); CONG. RESEARCH SERV., S. PRT. 114-31, TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS 53 (2016), https://www.gpo.gov/fdsys/pkg/CPRT-114SPRT24030/pdf/CPRT-114SPRT24030.pdf).

15. Pub. L. No. 115–97, 131 Stat. 2054 (2018) (amending the Internal Revenue Code).

16. Press Release, U.S. Dept. of Treasury, Unified Framework for Fixing Our Broken Tax Code (Sept. 27, 2017) [hereinafter Unified Framework], https://www.treasury.gov/press-center/press-releases/Documents/Tax-Framework.pdf; *see also* Stephen J. Pieklik et al., *Deducting Success: Congressional Policy Goals and the Tax Cuts and Jobs Act of 2017*, 16 PITT. TAX REV. 1, 6–7 (2018) (summarizing goals set forth in a policy framework prepared by the Trump Administration and the congressional tax-writing committees included in the Unified Framework).

business investments, especially to provide relief for small businesses."[17] The final legislation included a number of "special income tax provisions" designated as "tax expenditures" intended to alleviate tax burdens on individuals with business income as well as additional investments in existing small business tax expenditures.[18] For budget and revenue estimate purposes, "[t]ax expenditures are similar to direct spending programs that function as entitlements to those who meet established statutory criteria."[19]

The cost to taxpayers of the 2017 TCJA was substantial and initially projected to increase federal deficits by more than $1.8 trillion from 2018–2027.[20] More recently, the nonpartisan Congressional Joint Committee on Taxation ("JCT"), the official congressional budget estimator for tax expenditures, estimated that three tax expenditures targeted to small businesses (i.e., Sections 179 and 1202) and individuals with business income (i.e., Section 199A) will cost U.S. taxpayers more than $300.3 billion in revenue losses in the five-year period from 2019–2023.[21]

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17. Unified Framework, s*upra* note 16, at 7.

18. JOINT COMM. ON TAXATION, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" (Dec. 18, 2017) [hereinafter JCX-67-17], https://www.jct.gov/publications.html?func=startdown&id=5053 (last visited Apr. 18, 2020); *see also* JOINT COMM. ON TAXATION, JCX-55-19, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019-2023 2 (Dec. 18, 2019) [hereinafter JCX-55-19], https://www.jct.gov/publications.html?func=startdown&id=5238 (referring to "special income tax provisions" as "tax expenditures" because they "may be considered alternative means of accomplishing similar budget policy objectives") (showing the JCT's estimates of tax expenditures that have a greater than *de minimis* (i.e., more than $50 million of revenue loss) impact on the federal budget for use by the Congressional Budget Office (CBO), as well as the congressional tax-writing and budget committees in view of both "precedent" and "a subsequent statutory requirement that CBO rely exclusively on JCT staff estimates when considering the revenue effects of proposed legislation"). *See generally* Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005) (deconstructing the history of tax expenditure analysis).

19. JCX-55-19, *supra* note 18, at 2.

20. Letter from Keith Hall, Director, Cong. Budget Office, to Senator Rob Wyden, Ranking Member, Senate Comm. on Fin. (Jan. 2, 2018), https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/53437-wydenltr.pdf (stating that the Congressional Budget Office and Joint Committee on Taxation determined that the deficits under the Conference Agreement over the 2018-2027 period would increase by $1.5 trillion and the additional debt service would see a $1.8 trillion ten-year increase in deficits).

21. JCX-55-19, *supra* note 18, at 24–25 (estimating the cost of the following provisions from 2019-2023: (i) expensing under Section 179 of depreciable property ($59.9 billion); (ii) Section 199A, which is an up to 20 percent deduction for qualified business income ($233.5 billion); and, (iii) Section 1202, which allows a 100 percent exclusion of capital gain from tax for investments in certain small business stock ($6.9

However, at no point prior to or during debate over the TCJA did the congressional tax-writing committees publicly, meaningfully, and specifically consider whether this would be money well spent when it comes to women business owners ("WBOs").[22] In fact, during the sole U.S. Senate Committee on Finance ("SFC") hearing held in 2017 to examine proposals for business tax reform, women business owners were not even represented at the witnesses table.[23] This is acutely problematic because while women-owned firms have grown to number more than 40 percent of all U.S. firms as of 2019, the majority are small businesses operating in service industries and continue to face challenges growing their receipts and accessing capital.[24]

Moreover, research released and provided to Congress in June 2017 on WBOs and tax expenditures found that three of four of the most expensive small business tax expenditures included in the Code (i.e., IRC § 1202, § 1244, and § 179) were so limited in design that they either (i) explicitly excluded service firms (e.g., IRC § 1202), and by extension, the majority of women-owned firms; or (ii) effectively bypassed women-owned firms that are not incorporated (IRC § 1244) or that are service firms with few capital-intensive equipment investments altogether (IRC § 179).[25] The

billion)). *But see infra* Part III (explaining that Congress did not amend Section 1202 in TCJA, but that parts of Section 199A are derivative from Section 1202).

22. *Compare* BDBS, *supra* note 1, at 9 (connecting the Kogod Tax Policy Center's research done for BDBS with their review of 1,274 full congressional tax-writing committee hearings — from 1986 until 2016 — to confirm that neither the House of Representatives Committee on Ways and Means ("W&M") nor the U.S. Senate Committee on Finance ("SFC") has ever dedicated a full-committee hearing to assessing the impact of small business tax incentives with respect to women-owned firms), *with* S. REP. NO. 116-19, at 6 (2019) (giving an example of a hearing that included four women, out of seventeen witnesses, during 2017, but still did not hold a full committee hearing specifically on the tax challenges of women business owners in connection with tax reform), *and* H.R. REP. NO. 115-1115, at 117–18 (2019) (showing that the W&M Subcommittee on Tax Policy held two hearings in 2017 on tax reform soliciting testimony from eight witnesses, two of whom were women business owners).

23. *See Business Tax Reform: Hearing Before the S. Comm. on Fin.*, 115th Cong. 342 (2017); S. REP. NO. 116-19, at 6 (2019) (noting that the SFC held the hearing on September 19, 2017, and invited four witnesses to testify: Scott Hodge, President, Tax Foundation; Donald B. Marron, Institute Fellow, Urban Institute; Troy K. Lewis, Immediate Past Chair, Tax Executive Committee, American Institute of Certified Public Accountants; and Jeffrey D. DeBoer, President and CEO, Real Estate Roundtable).

24. *See* BDBS, *supra* note 1, at 7; ANNOTATED BIBLIOGRAPHY, *supra* note 5, at 8; 2019 AMERICAN EXPRESS REPORT, *supra* note 12, at 3, 10–11.

25. BDBS *supra* note 1, at 3 (summarizing the results of the BDBS survey of the members of Women Impacting Public Policy ("WIPP") and its coalition partners as a measure of (i) how often WBOs claimed small business tax expenditures; (ii) how familiar self-identified WBOs were with Sections 1202, 1244, 179, and 195; and (iii)

challenges that women business owners face are not new and Congress had the opportunity to consider them in connection with the 2017 tax reform debate.[26] It failed to do so.

This Article considers Congress' latest efforts to spur economic growth through the TCJA with respect to women-owned firms and concludes that Congress effectively doubled-down on the blind spot it has with respect to women business owners and tax expenditures targeted to small businesses. Although millions of WBOs will have some tax savings from TCJA's marginal rate cuts and other provisions, this Article argues that the legislation had unintended consequences with respect to the ability for women-owned firms to access capital, reflecting the billion dollar blind

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whether those firms used them to raise capital). The survey, which WIPP consultants conducted from March 9, 2017 through April 11, 2017, received 515 completed responses from women who, on their own, or with other women, owned at least 51 percent of a business, from the more than 550,000 WIPP or coalition partner members invited to participate. *See* Jane Campbell, *Women Business Owners Are Missing Out On Billions in Tax Incentives & Investments: Congress Can Change That*, NAT'L ASS'N OF WOMEN IN REAL EST. BUS. (Oct. 10, 2017), https://www.nawrb.com/women-business-owners-are-missing-out-on-billions-in-tax-incentives-investments-congress-can-change-that; WOMEN IMPACTING PUBLIC POLICY, REPORT: WOMEN BUSINESS OWNERS MISS OUT ON KEY TAX PROVISIONS DESIGNED TO STIMULATE SMALL BUSINESS GROWTH (2017), https://www.wipp.org/page/BlindSpot.

26. Caroline Bruckner submitted multiple statements for the record to both the SFC and W&M committees and testified before the U.S. House Committee on Small Business in connection with hearings organized as part of the 2017 legislative debate on tax reform. The testimony and submissions included links to and excerpts from *BDBS*, which detailed the legislative history and Congress' intent to provide access to capital and opportunities for growth to small businesses with respect to four specific tax expenditures (i.e., I.R.C. § 1202; I.R.C. § 1244; I.R.C. § 179; I.R.C. § 195). *See Small Business Tax Reform: Modernizing the Code for the Nation's Job Creators*: *Hearing Before the H. Comm. on Small Bus.*, 115th Cong. 5 (2017) (testimony of Caroline Bruckner), https://republicans-smallbusiness.house.gov/uploadedfiles/10-4-17_bruckner_testimony.pdf; *Statement for the Record in Connection with July 13 Hearing*, *"How Tax Reform Will Help America's Small Businesses Grow and Create New Jobs"*, 115th Cong. 193 (2017) (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University Resident), https://docs.house.gov/meetings/WM/WM05/20170713/106236/HHRG-115-WM05-Transcript-20170713.pdf; *Submission from Caroline Bruckner to the U.S. S. Fin. Comm. in Response to the Chair's Request for Recommendations for Tax Reform* (on file with author — confidential submission); Caroline Bruckner, *Statement for the Record to the U.S. Senate Comm. on Small Bus. & Entrepreneurship in Connection with the June 14 Hearing Titled, "Tax Reform & Barriers to Small Bus. Growth"* (June 28, 2017) (statement of Caroline Bruckner); Caroline Bruckner, *Women in Business Must Be a Priority in U.S. Tax Reform Plans*, FIN. TIMES, (Aug. 30, 2017), https://www.ft.com/content/ebda758c-8cb7-11e7-a352-e46f43c5825d; Caroline Bruckner, *How the US Tax Code Bypasses Women Entrepreneurs*, THE CONVERSATION (Oct. 25, 2017, 7:39 PM), https://theconversation.com/how-the-us-tax-code-bypasses-women-entrepreneurs-86039.

spot Congress has when it comes to WBOs and the Code. Post-tax reform and given the economic devastation triggered by the 2020 novel coronavirus pandemic, there is an even greater urgency for policymakers to engage in effective tax expenditure oversight and work with federal agencies and congressional committees to develop the data and research required for evidence-based policymaking.

Part II of this Article provides background on the economic contributions of women's business ownership and reviews how women-owned firms are organized, their average receipts, and growth trends. In addition, Part II summarizes the ongoing challenges these firms encounter growing their businesses and accessing capital. Part III sets forth new data on the underrepresentation of women as witnesses before the tax-writing committees and its connection to the recent tax reform process. Part IV of this Article summarizes two small business tax expenditures Congress funded in the TCJA that reflect the unintended consequences of Congress' billion dollar blind spot including: (1) *Section 199A – Qualified Business Income Deduction*; and (2) *Section 179 – Accelerated Deduction for Small Businesses*. Part V discusses recent efforts by Congress to consider how WBOs can benefit from targeted tax policy and suggests strategies for Congress to develop effective tax expenditure oversight and evidence-based policymaking.

## II. WOMEN BUSINESS OWNERS AS AN ECONOMIC FORCE

Since Census started tracking them in 1972, the number of women-owned firms has increased exponentially.[27] Prior to 2017, the most consistent measure of this increase was the Census Survey of Business Owners ("SBO"), which Census conducted every five years, in years ending in two or seven, with the most recent being done in 2012.[28] That year, Census counted more than 9.9 million women-owned firms — an

27. BDBS, *supra* note 1, at 11. *See generally* ANNOTATED BIBLIOGRAPHY, *supra* note 5 (stating that the 1977 Census reported that 75 percent of all women-owned firms were concentrated in the services and retail trade sectors).

28. *See* U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS (SBO), https://www.census.gov/econ/overview/mu0200.html (last visited Apr. 18, 2020). In 2017, Census announced it would replace the SBO with an annualized survey called the Annual Business Survey ("ABS"). *Census Bureau Announces New 2017 Annual Business Survey*, U.S. CENSUS BUREAU (June 19, 2018), https://www.census.gov/news room/press-releases/2018/annual-business-survey.html. Census' decision to transition away from the SBO to the ABS, which will only track employer firms, could mean Census "is unable to guarantee comprehensive data sets for 90% of women-owned small businesses." NAT'L WOMEN'S BUS. COUNSEL, 2019 ANNUAL REPORT 28 (2019) [hereinafter 2019 NWBC ANNUAL REPORT], https://cdn.www.nwbc.gov/wp-content/uploads/2019/12/20204228/NWBC-2019-Annual-Report-508compliant.pdf.

increase of 26.8 percent from 2007.[29] More recent data, based on the 2012 SBO results, continues to show the skyrocketing growth of WBOs over the last four decades.[30] In 2019, there were approximately thirteen million (12,943,400) WBOs with revenue of almost $2 trillion.[31] When combined with firms owned equally by men and women, women-owned firms total 15,258,900 — or "49 percent of all businesses."[32]

Notably, women of color have led the charge in the growth of women-owned businesses.[33] Firms owned by women of color grew at a rate of 43 percent over the last five years (double the 21 percent rate of all new women-owned firms) and "account for 50 percent of all women-owned businesses."[34] In 2019, women-owned firms employed 8 percent of the private sector workforce, which translates to approximately 9.4 million people.[35]

### *A. Most Women-Owned Firms Are Small Business Service Firms*

Despite these gains, private sector and academic research has found that "although women business owners account for 40 percent of all U.S. firms and the total number of women-owned firms has increased over the last ten years by 58 percent, [they] remain small businesses primarily operating as service firms (more than 60 percent) and continue to face challenges growing receipts and accessing capital."[36] Government research has found that "almost all (99.9 [percent]) of women-owned businesses are small businesses" and that the overwhelming majority (90 percent) of women-

29. Erika H. Becker-Medina*, Women-Owned Firms on the Rise*, U.S. CENSUS BUREAU (July 31, 2019), https://www.census.gov/newsroom/blogs/random-samplings/2016/03/women-owned-businesses-on-the-rise.html.

30. 2019 AMERICAN EXPRESS REPORT*, supra* note 12, at 3.

31. *Id.*

32. *Id.*

33. *Impact on the Budget and American Families: Hearing on 2017 Tax Law Before the H. Comm. on Budget*, 116th Cong. 4 (2019) [hereinafter 2019 TAX REFORM BUDGET HEARING] (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (citing data from AMERICAN EXPRESS, *The 2018 State of Women-Owned Businesses Report* (2018) [hereinafter 2018 AMERICAN EXPRESS REPORT], https://about.americanexpress.com/files/doc_library/file/2018-state-of-women-owned-businesses-report.pdf) (noting that firms owned by women of color grew by 163 percent from 2007 to 2018 and 64 percent of new women-businesses launched every day are owned by women of color); *id*. at 4–5.

34. 2019 AMERICAN EXPRESS REPORT*, supra* note 12, at 4–5.

35. *Id.* at 3.

36. 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 47 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University).

owned businesses are non-employer businesses (i.e., businesses with no employees).[37] In terms of revenue, in 2012, 88.5 percent of women-owned firms had annual receipts below $100,000.[38] Notwithstanding their exponential growth, less than 2 percent of (or just 171,842) of WBOs had annual receipts in excess of $1 million in 2012.[39]

**Table 1. 2012 Census SBO Data on Women-Owned Firms[40]**

| Receipt/Revenue Size | Number of Women-Owned Firms | Percent of Women-Owned Firms |
|---|---|---|
| **Total/2012 SBO Data** | 9,878,397 | 100% |
| **less than $5,000** | 2,497,048 | 25.3% |
| **$5,000 to $9,999** | 1,776,343 | 18.0% |
| **$10,000 to $24,999** | 2,722,295 | 27.6% |
| **$25,000 to $49,999** | 1,052,900 | 10.7% |
| **$50,000 to $99,999** | 681,243 | 6.9% |
| **$100,000 to $249,999** | 553,503 | 5.6% |
| **$250,000 to $499,999** | 258,398 | 2.6% |
| **$500,000 to $999,999** | 164,824 | 1.7% |
| **$1,000,000 or more** | 171,842 | 1.7% |

This is a sharp contrast to the 6.2 percent or 923,173 male-owned firms with receipts of $1 million or more.[41] Also troubling is a 2019 estimate that found that while overall women-owned firms averaged $142,900 in earnings, firms owned by women of color averaged only $65,800 in annual revenues, while non-minority women-owned firms averaged more than

37. Michael J. McManus, *Women's Business Ownership: Data from the 2012 Survey of Business Owners,* U.S. SMALL BUS. ADMIN. 2, 4 (May 31, 2017), https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf (defining a small business as having fewer than 500 employees).

38. BDBS, *supra* note 1, at 11 (noting that women owned businesses are mostly in the service industry).

39. *Id.*; *see also* McManus, *supra* note 37, at 11 (supporting the point that women-owned firms grew from 2007 to 2012).

40. BDBS, *supra* note 1, at Table 1; *see id.* at 12 n.39 (stating that the table is from the "research division of National Women's Business Council derived from Census 2012 SBO data"); *see also Behind the Numbers: The State of Women–Owned Businesses in 2018*, WOMEN'S BUSINESS ENTER. NATIONAL COUNCIL (Oct. 10, 2018), https://www.wbenc.org/blog-posts/2018/10/10/behind-the-numbers-the-state-of-women-owned-businesses-in-2018 (stating the number of women-owned businesses which generate less than $100,000 is 88 percent of all women-owned businesses and that only 1.7 percent of all women-owned businesses generate $1,000,000 or more in revenue).

41. BDBS, *supra* note 1, at 11.

double — $218,800.[42]

Despite the economic recovery since 2012, the "vast majority" of women-owned businesses (88 percent or 10,775,600 firms) continued to generate revenues less than $100,000 in 2018, and that "[overall] revenue growth for women-owned business was driven by the addition of firms, not an increase in average revenue per firm."[43]

In terms of industry representation, although women-owned firms have permeated every industry sector to some degree, they remain predominately active in service industries and are underrepresented in other industries.[44] "For example, according SBA's Office of Advocacy's analysis of Census' 2012 SBO data, while women own 36 [percent] of all U.S. firms and 20 [percent] of all employer businesses, 'women-owned businesses were only 9 [percent] of the construction industry and 24 [percent] of the manufacturing industry.'"[45] More recent private sector data on WBOs has found:

- Half of women-owned businesses are concentrated in three industries: other services (23%), health care and social assistance (15%), and professional/scientific/technical services (12%);
- Women are significantly more likely to launch businesses within the healthcare (10%) or education sectors (9%) than men (5% in both cases). In contrast, men are significantly more likely to start businesses in the construction and manufacturing industries (12%) than women (4%).
- Women-owned businesses employ the most people in healthcare and social assistance (20%), accommodations and food services (16%) and administrative, support and waste management services (13%).

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42. *See* 2019 AMERICAN EXPRESS REPORT, *supra* note 12, at 5.

43. 2018 AMERICAN EXPRESS REPORT, *supra* note 33, at 5 (finding that women entrepreneurship is still growing however).

44. BDBS, *supra* note 1, at 12; *see* McManus, *supra* note 37, at 4 (highlighting that the top four out of five industries women own businesses in are services and that these industries typically have a higher than average ratio of WBOs); *see also* 2018 AMERICAN EXPRESS REPORT, *supra* note 33, at 11 (determining that "other services" firms owned by women, such as hair salons and pet care businesses, have experienced 126 percent growth from 2007 to 2018 compared to 58 percent growth for all women-owned businesses in the same time period).

45. BDBS, *supra* note 1, at 12 (showing statistics of how women are underrepresented in certain industries). *See generally* McManus, *supra* note 37 (discussing representation of women-owned business across all U.S. firms as a percent of employer business in 2012); SCORE Association, *The Megaphone of Main Street: Women's Entrepreneurship Spring 2018*, SCORE ASS'N (2018), https://s3.amazonaws.com/mentoring.redesign/s3fs-public/SCORE-Megaphone-of-Main-Street-Women%E2%80%99s-Entrepreneurship-Spring-2018_1.pdf (highlighting the representation of women-owned businesses in various industries).

- Women-owned businesses have the *highest total revenue* in wholesale trade (17%), retail trade (15%) and professional, scientific and technical services (10%).[46]

Although limited federal government data and private sector data on the number of women-owned firms, their receipts, and presence among industries is available, similar government research on the current number of women-owned firms operating as C-corporations or S-corporations from existing SBA or IRS data is not regularly collected and published.[47]

Instead, IRS publishes general statistics for firm organization showing that sole proprietors, subchapter S-corporations, and partnerships, collectively, filed approximately 95 percent of the 33.4 million business tax returns for the 2013 tax year; sole proprietors filed 72 percent of the returns, followed by S-corporations (13 percent), partnerships (10 percent), and C-corporations (5 percent).[48] That noted, IRS does have some data for women-owned firms operating as sole proprietors, and SBA's Office of Advocacy does track data on the legal organization for small firms generally.[49] In particular, IRS research division, the Statistics of Income ("SOI"), provides data on women-owned sole proprietors and, as of 2014, counted 11.7 million women-owned firms operating as sole proprietors (an estimated 42.6 percent of the total 27.6 million sole proprietors) using taxpayer data, "but does not have these data for the other forms of businesses."[50]

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46. *Behind the Numbers: The State of Women-Owned Businesses in 2018*, WBENC (Oct. 10, 2018), https://www.wbenc.org/blog-posts/2018/10/10/behind-the-numbers-the-state-of-women-owned-businesses-in-2018 (analyzing data from the 2018 AMERICAN EXPRESS REPORT).

47. BDBS, *supra* note 1, at 11–12. This kind of data, if regularly collected and made available, would provide insight to policymakers on the uptake rates and revenue loss distribution of small business tax expenditures with respect to WBOs as described *infra* Part IV.

48. GARY GUENTHER, CONG. RESEARCH SERV., IF11122, 2019 TAX FILING SEASON (2018 TAX YEAR): SECTION 199A DEDUCTION FOR PASSTHROUGH BUSINESS INCOME (2019) [hereinafter CRS199A REPORT], https://fas.org/sgp/crs/misc/IF11122.pdf (explaining that evidence suggests Congress intended the 199A deduction for noncorporate businesses to be a tax cut "comparable" to the corporate tax rate cut under TCJA).

49. *See Frequently Asked Questions about Small Business*, SMALL BUS. ASS'N OFF. OF ADVOC., (Sept. 24, 2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/24153946/Frequently-Asked-Questions-Small-Business-2019-1.pdf.

50. BDBS, *supra* note 1, at 12 n.46.

### *B. Women-Owned Firms Still Encounter Growth and Access to Capital Challenges*

Despite the considerable gaps in government research on how women-owned firms are organized, extensive work has been done by academics on gender and entrepreneurship.[51] Much of it has focused on the challenges women business owners have growing their revenue and accessing capital. In fact, although Census research has tracked a dramatic spike in the number of women-owned firms in recent decades, average receipts and firm size have not grown to the same degree, indicating, among other things, that challenges remain for these small business owners.[52]

For example, in 2017, SBA's Office of Advocacy issued a report on women-owned firms finding that they continue to "lag behind in revenue and employment. For every dollar of revenue an average women-owned employer business earns, a male-owned business earns $2.30. For every [ten] employees at a women-owned business, a male-owned business employs [fifteen]."[53]

Related to the growth challenges women-owned firms encounter is the documented challenge women-owned firms have accessing capital.[54]

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51. *See generally* ALBERT N. LINK & DEREK R. STRONG, GENDER AND ENTREPRENEURSHIP: AN ANNOTATED BIBLIOGRAPHY (2016) (covering scholarly contributions from 1979 through 2016 to gender and entrepreneurship); Patricia G. Greene et al., *Women Entrepreneurs: Moving Front and Center: An Overview of Research and Theory* (2003) (overview on research and theory on women entrepreneurs); Jennifer Jennings & Candida Brush, *Research on Women Entrepreneurs: Challenges To (and From) the Broader Entrepreneurship Literature?*, 7 ACAD. MGMT. ANNS. 663 (2013). However, this research generally does not consider tax issues. To see what research has been done on women and tax issues specifically, see BDBS, *supra* note 1, at 15 n.63 (citing Anthony C. Infanti & Bridget J. Crawford, *Critical Tax Theory: An Introduction* (U. of Pitt. Legal Studies Research, Working Paper No. 2009-04), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333799#) (listing a series of foundational works on women and tax issues generally and explaining that "legal scholars beginning with Grace Blumberg and including: Anne Alstott, Dorothy Brown, Bridget Crawford, Anthony Infanti, Carolyn C. Jones, Marjorie Kornhauser, and Nancy Staudt to name only some, have developed research analyzing 'what impact the tax laws have on historically disempowered groups'") .

52. *See, e.g.*, Susan Coleman & Alicia Robb, *Access to Capital by High-Growth Women-Owned*, NAT'L WOMEN'S BUS. COUNCIL (2014), https://cdn.www.nwbc.gov/wp-content/uploads/2018/02/27191226/High-Growth-Women-Owned-Businesses-Access-to-Capital-Report.pdf.

53. *See* McManus, *supra* note 37, at 13.

54. *See A Compendium of National Statistics on Women-Owned Businesses in the U.S.*, CTR. FOR WOMEN'S BUS. RESEARCH (2001), https://cdn.www.nwbc.gov/wp-content/uploads/2018/02/27202652/A-Compendium-of-National-Statistics-on-Women-Owned-Businesses-in-the-U.S.pdf. *See generally* CANDIDA G. BRUSH ET AL., DIANA REPORT: WOMEN ENTREPRENEURS 2014: BRIDGING THE GENDER GAP IN VENTURE CAPITAL (2014) (analyzing venture capital investments in women entrepreneurs since

Indeed, some older research found that "lack of access to capital (including personal resources) is seen as a major reason for the concentration of women-owned businesses in service and retail."[55] More recent research has reiterated that WBOs "struggle to access capital, which in turn restricts their growth."[56]

In 2018, the nonpartisan National Women's Business Council (the "NWBC"), which is a federal advisory committee that provides independent analysis, research, and policy recommendations to the Administration, SBA, and the congressional small business committees, published a report on WBO's ability to access capital and reiterated that when it comes to financing their businesses, women-owned firms face systemic obstacles that "impede their growth, many of which are in place from the beginning."[57] In general, "women start businesses with smaller amounts of capital than men, are less likely to raise capital from external sources, and . . . are more likely to say they do not need financing to start a business because they are more likely than men to rely on owner-provided equity to launch their firms."[58]

With respect to accessing bank loans, research has found that:

> [S]everal characteristics of women-owned businesses . . . affect their access to loans and set them apart from men-owned entities, including:
>
> - WBOs are slightly less likely to have high credit scores compared to men;
> - Women-owned businesses are less likely to be incorporated;
> - WBOs have fewer years of industry and startup experience;
> - WBOs are less likely to apply for new loans; and
> - WBOs are slightly more likely to not apply for new credit when they need it, ostensibly because of fear of denial.[59]

Those fears are not unwarranted. The data on WBOs and conventional bank loans shows generally, and SBA loans show in particular, that WBOs represent a minority of the total number of conventional and SBA loans for small businesses. For example, in the fiscal year of 2019, SBA approved more than $28.2 billion in loans of which "nearly" $6.6 billion (or 23

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1999).

55. *See* BDBS, *supra* note 1, at 13.

56. NAT'L WOMEN'S BUS. COUNCIL, UNDERSTANDING THE LANDSCAPE: ACCESS TO CAPITAL FOR WOMEN ENTREPRENEURS 1 (Mar. 1, 2018) [hereinafter NWBC 2018 REPORT], https://cdn.www.nwbc.gov/wp-content/uploads/2018/03/28215658/NWBC-Report_Understanding-the-Landscape-Access-to-Capital-for-Women-Entrepreneurs.pdf.

57. *Id*. at 2.

58. *Id*.

59. *Id*. at 16.

percent of the total) went to women-owned firms through the 7(a) program.[60]

In 2014, the U.S. Senate Committee for Small Business and Entrepreneurship, published its own report ("Small Business Committee Report") on existing barriers to women's entrepreneurship and concluded that "in the area of capital, studies find that women do not get sufficient access to loans and venture investment."[61] Specifically, the Small Business Committee Report found that access to capital is a more severe challenge for women-owned firms when it noted:

> 1. Women account for only 16 percent of conventional small business loans, and 17 percent of SBA loans even though they represent 30 percent of all small companies.
> 2. Of conventional small business loans, women only account for 4.4 percent of total dollar value of loans from all sources. In other words, just $1 of every $23 in conventional small business loans goes to a woman-owned business.[62]

More recently, the NWBC cited research in its December 2019 annual report that in 2018, female founders got less than 3 percent of the $130 billion of venture capital dollars.[63] The consequences of failing to have reliable access to capital are well-documented in the existing literature, "finding evidence that [WBOs] have difficulty accessing debt capital, lines of credit, and other forms of funding."[64] These challenges can compound and "lead to difficulties in market access as corporate buyers of goods and services frequently evaluate their potential suppliers' financial ability to determine their dependability."[65]

As alarming as these facts are, "notable gaps remain in government research on women-owned firms and access to capital issues."[66] In fact, the Small Business Committee Report ultimately found that:

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60. U.S. SMALL BUS. ADMIN., SBA FINANCIAL AGENCY FINANCIAL REPORT FISCAL YEAR 2019 1 (Nov. 15, 2019), https://www.sba.gov/sites/default/files/2019-12/SBA_FY_2019_AFR-508.pdf; *see also* NWBC 2018 REPORT *supra* note 56, at 5–8 (analyzing SBA's loan data from FY 2011-2016 set forth in Tables 2, 3, 4, and 5 that shows that in each year for the SBA's flagship lending programs, WBOs represent less than one-quarter of overall loan recipients by volume and participation during those years).

61. *See* STAFF OF S. COMM. ON SMALL BUS. & ENTREPRENEURSHIP, MAJORITY REP. OF THE U.S. SEN. COMM. ON SMALL BUS. & ENTREPRENEURSHIP, 21ST CENTURY BARRIERS TO WOMEN'S ENTREPRENEURSHIP 2 (2014).

62. *Id*.

63. 2019 NWBC ANNUAL REPORT*, supra* note 28, at 17.

64. NWBC 2018 REPORT, *supra* note 56, at 11–12.

65. *Id*. at 13.

66. *See* BDBS*, supra* note 1, at 14.

> [W]hen it comes to assessing the capital needs of women-owned businesses, limited government data on small business credit and virtually none that is gender-based has hindered the development of effective public policy to support and provide adequate access to capital. The lack of data is as astounding as it is concerning.[67]

At the same time, what limited research that is available on WBOs and tax issues has readily acknowledged tax as an important source of equity for small businesses:

> Taxation plays a key role in the survival and growth of small businesses, primarily through its effect on equity infusion. The major source of equity capital for expansion of a business is reinvested profits. The amount of tax the business must pay determines the amount of money available for growth and expansion.[68]

Notwithstanding the fact that policymakers often design tax provisions as a means to provide access to capital to small businesses, the overall absence of government tax data and research on women-owned firms' ability to claim tax expenditures as a means to access capital remains a billion dollar blind spot for policymakers and taxpayers.[69] Compounding the overall lack of tax research on WBOs is the reality that congressional tax-writers are significantly less likely to hear testimony from women during hearings. As described in Part III *infra*, analysis of witness testimony presented during congressional tax-writing committee hearings reveals that women are regularly underrepresented as witnesses before these committees.

## III. DATA ON WOMEN TESTIFYING BEFORE THE TAX-WRITING COMMITTEES

In announcing the decision to move forward with tax reform in April 2017, then-Chair of W&M, Rep. Kevin Brady (R-TX), announced that W&M would hold a series of hearings on tax reform in Spring 2017 with a plan to vote on legislation later in the Summer.[70] This announcement

67. BDBS*, supra* note 1, at 14 (citing STAFF OF S. COMM. ON SMALL BUS. AND ENTREPRENEURSHIP, *supra* note 61).

68. BDBS*, supra* note 1, at 5.

69. *See* BDBS*, supra* note 1, at 4; *see also* Ariel Jurow Kleiman et al., *The Faulty Foundatons of the Tax Code: Gender and Racial Bias in Our Tax Laws*, NATIONAL WOMEN'S LAW CENTER (2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/11/NWLC-The-Faulty-Foundations-of-the-Tax-Code-Accessible-FINAL.pdf (acknowledging the absence of data on tax expenditure distribution among women, people of color, and other marginalized communities generally and recommending, *inter alia*, applying inclusive budgeting principles to the entirety of the tax system).

70. REUTERS, *U.S. House Tax Committee Plans Public Hearings on Tax Overhaul*,

followed a years-long effort to overhaul the Code and hold a series of hearings, which, in prior congresses at least, had been a bipartisan effort.[71] Congressional committees organize hearings in one of four types: legislative, oversight, investigative, or nomination as a primary means of soliciting expert testimony, insight, and advice for legislative and oversight functions.[72]

In 1986, which was the last time Congress successfully passed comprehensive tax reform, the tax-writing committees adopted an aggressive outreach strategy over the preceding two years that included hearings and testimony from businesses, individuals, experts, and other stakeholders, resulting in eighty-nine hearings with nearly 2,600 witnesses, according to one analysis.[73] During that time, JCT prepared sixty-two reports over twenty-one months; CBO and CRS wrote an additional ten, with one specifically dedicated to considering the racial implications of provisions of the 1986 tax reform effort.[74]

In contrast, the tax reform hearing process during the 115th Congress was much more condensed. As summarized in Table 2 below, the congressional tax-writing committees held a total of twelve hearings on tax reform in 2017 alone, and less than 19 percent of the witnesses testifying at these hearings were women.[75] Of the twelve tax reform hearings, women

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CNBC (Apr. 6, 2017, 6:06 AM), https://www.cnbc.com/2017/04/06/us-house-tax-committee-plans-public-hearings-on-tax-overhaul.html.

71. Max Baucus & Dave Camp, *Tax Reform Is Very Much Alive and Doable*, WALL ST. J. (Apr. 7, 2013, 6:23 PM), https://www.wsj.com/articles/SB10001424127887323611604578396790773598474.

72. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL98-317, TYPES OF COMMITTEE HEARINGS (2018), https://www.senate.gov/CRSpubs/cb39da50-6535-4824-9d2f-e5f1fcf0a3e4.pdf.

73. Peter Carey et al., *The Trump Tax Law Has Big Problems. Here's One Big Reason Why*, CENT'R FOR PUB. INTEGRITY (Jan. 15, 2019), https://publicintegrity.org/inequality-poverty-opportunity/taxes/trumps-tax-cuts/trump-tax-law-has-big-problems.

74. *Id*.

75. Data for Tables 2, 3 & 4 extrapolated from the Congressional Record Representation Dataset [hereinafter CRRD] (dataset on file with author). The CRRD is the first-of-its kind digital diversity and inclusion legislative tool in the U.S. designed to track the number of women and people of color testifying before congressional committees to measure diversity and inclusion of congressional witnesses. Developed in 2019, the CRRD is comprised of witnesses testifying at congressional legislative, oversight or investigative hearing identified using published committee end-of-congress (EOC) reports and hearing transcripts. The CRRD excludes witnesses at confirmation hearings or mark-ups. The CRRD has been created by human-based processing of publicly available EOC Reports, which congressional committees are required to prepare and file at the end of each Congress. EOC Reports document a committee's legislative activities during a Congress and identify witnesses that testified at hearings. Preliminary results for the gender of witnesses before SFC and W&M from the CRRD for the 110th–112th Congresses announced in January 2020 at the 20th

participated as witnesses in only seven, and as noted *supra*, no women business owners testified at the sole SFC hearing on business tax reform in 2017. Notably, no women testified at five (42 percent) of the twelve total tax reform hearings the tax-writing committees held on tax reform in 2017.[76]

| **Table 2. 115th Congress Tax Reform Hearing Witness Totals** | | |
|---|---|---|
| **Totals** | **SFC** | **W&M** |
| **Tax Reform Hearings** | 5 | 7 |
| **Hearings without any Women** | 2 | 3 |
| **Witnesses** | 17 | 48 |
| **Men** | 13 | 40 |
| **Women** | 4 (24%) | 8 (17%) |

To be fair, the absence of women's testimony before the tax-writing committees during the tax reform debate in the 115th Congress is not unusual when considered in the larger context of women testifying before the tax-writing committees in recent congresses on tax reform and the failure of the tax-writing committee to hold hearings focused on women business owners.

In fact, research published in June 2017 — and made available to the tax-writing committees — found that of the 1,274 full-committee hearings over 1,521 days of each of the congressional tax-writing committees for the 99th to the 114th Congresses (1985–2016), neither committee had held any

Annual Meeting of the Southern Political Science Association in San Juan, Puerto, Rico. CAROLINE BRUCKNER, KAREN O'CONNOR & DAKOTA STRODE, A SEAT AT THE TABLE: JUST HOW REPRESENTATIVE IS THE LEGISLATIVE PROCESS? AN ANALYSIS OF THE GENDER DISTRIBUTION OF WITNESSES BEFORE A SELECT GROUP OF COMMITTEES IN THE U.S. CONGRESS (2020) [hereinafter CRRD PRELIMINARY FINDINGS PAPER], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543554.

76. For purposes of determining how many tax reform hearings the congressional tax-writing committees held during the 110th–115th Congresses, the author initially reviewed the tax-writing committees EOC reports for the 110th–115th Congresses and identified each legislative, oversight, and investigative hearing that included the terms "reform" or "tax reform" in the hearing's title or the executive summary. The search criteria then expanded to include legislative hearings that contemplated major changes to the tax code indicative of reform as described in the summary of the hearing included in the EOC reports. Preliminary totals were compared to the general tax reform hearing lists developed and maintained by Professor Annette Nellen at San Jose State University, available at https://www.sjsu.edu/people/annette.nellen/website/115th-hearings.htm#General (last visited on Apr. 19, 2020). The final hearing totals were adjusted to include tax-writing committee general tax reform hearings listed on Professor Nellen's site in the general tax reform hearing category notwithstanding the absence of the word "reform" in the hearing title.

full committee hearings dedicated to assessing the impact of tax incentives designed to create access to capital with respect to women-owned firms, despite the fact that women business owners had grown from little more than 3 million to more than 11.3 million, or 38 percent, of all U.S. businesses during the same period.[77] A more extensive analysis of witness testimony at tax reform hearings held by the tax-writing committees during the 110th through the 115th Congresses from publicly-available committee reports and transcripts shows that women did not regularly participate as witnesses even before the 115th Congress.[78] For example, 44 percent of the SFC tax reform hearings had no women as witnesses, while 46 percent of W&M tax reform hearings failed to include any women. Overall, women comprised merely 17.5 percent of the total 462 witnesses called to testify at the 91 tax reform hearings the tax-writing committees held from 2007 through 2017.

| **Table 3. 110th–115th Congress Tax Reform Hearing Witness Totals** | | |
|---|---|---|
| **Totals** | **SFC** | **W&M** |
| **Total Tax Reform Hearings** | 50 | 41 |
| **Hearings without any Women** | 22 (44%) | 19 (46%) |
| **Witnesses** | 206 | 256 |
| **Men** | 168 (82%) | 213 (83%) |
| **Women** | 38 (18%) | 43 (17%) |

Admittedly, the foregoing data does not include any tax reform hearings held by other committees during the same period that may have specifically focused on women business owners and tax reform. Nor does it reflect the number of women of color who may have testified, which is not currently available, but is particularly relevant given that women of color are 50 percent of all women-owned firms as noted in Part II *infra*.

In addition, the data included in Table 3 counts twenty fewer SFC tax reform hearings than the total number that the then-SFC Chair Orrin Hatch (R-UT) counted in a press release issued in November 2017 stating SFC tax reform efforts "over the last six years" included holding "70 hearings on how the tax code can be improved and streamlined to work better for all Americans."[79] However, the witness data of all legislative hearings (i.e.,

77. BDBS, *supra* note 1, at 8.

78. CRRD*, supra* note 75.

79. Press Release, Senate Finance Committee, Senate Finance Committee Takes on Tax Reform (Nov. 2017) [hereinafter Senate Finance Committee Takes on Tax Reform], https://www.finance.senate.gov/imo/media/doc/11.9.17%20Committee%20History.pdf. The difference in the SFC tax reform hearing totals is attributable to the

all legislative, oversight or investigative hearings, excluding confirmation hearings or mark-ups) held by the tax-writing committees from the 110th (2007-2008) through the 115th (2017-2018) Congresses shows that the underrepresentation of women as witnesses is not confined to tax reform hearings. Rather, the data shows that women are consistently underrepresented at legislative hearings. For example, of the 355 legislative hearings the SFC held from the 110th through the 115th Congress, 47 percent (166) did not include any women witnesses. W&M was comparable: it held more total hearings (479), but it also did not have women testify at 166 (35 percent). This systemic inequity is particularly problematic given SFC alone "has the largest committee jurisdiction in either chamber of Congress, oversees more than 50 percent of the federal budget and has jurisdiction over tax, trade and healthcare policy."[80]

| **Table 4. 110th–115th Total SFC and W&M Legislative Hearings** | | |
|---|---|---|
| **Totals** | **SFC** | **W&M** |
| **Total Legislative Hearings** | 355 | 479 |
| **Total Hearings Without Women** | 166 (47%) | 166 (35%) |
| **Total Witnesses** | 1307 | 2320 |
| **Men** | 986 | 1719 |
| **Women** | 321 (24.56%) | 601 (25.9%) |

A preliminary 2020 study of the representation of women as witnesses before the tax-writing committees during the 110th–112th Congress concedes "that the low rates of women testifying could reflect other inequalities in the political system such as a lower percentage of women as committees members, as well as the fact that many senior executive Federal agency positions are held by men."[81] In addition, that study noted that "the overall percentage of women as witnesses testifying before these House and Senate committees essentially mirrors the percentage of women in Congress — both in the low 20 percentages, yet it is actually higher than percentage of women serving as members of these committees."[82] However, the overall consistent underrepresentation of women as witnesses in congressional tax-writing committee hearings remains surprising

more limited criteria used for purposes of this article described *supra* note 76. The SFC EOC report for the 115th Congress did not include a tax reform hearing list beyond the hearings SFC held during the 115th Congress. *See generally* S. Rep. No. 116–19 (2019).

80. Senate Finance Committee Takes on Tax Reform, *supra* note 79.

81. CRRD PRELIMINARY FINDINGS PAPER, *supra* note 75, at 16.

82. *Id.*

considering that over the last forty years, WBOs have grown to number more than 42 percent of all U.S. businesses, which would suggest a greater presence of qualified women available to testify on business and tax issues generally.

The impact of the absence of WBOs being fully represented as witnesses during the tax-writing committees' tax reform hearings is no less than a doubling down on an existing billion dollar blind spot Congress has when it comes to WBOs and small business tax expenditures.

## IV. TCJA & SMALL BUSINESS TAX EXPENDITURES

The consequences of the absence of WBOs participating in the tax reform legislative process is reflected by two tax expenditures funded in the TCJA, Sections 199A and 179, which JCT now estimates will cost taxpayers almost $300 billion in lost revenue from 2019–2023.[83]

### *A. Section 199A – Qualified Business Income Deduction*

Once it decided to cut the top corporate tax rate from 35 percent to 21 percent, Congress included a new deduction in the TCJA for individuals with business income, Section 199A, to "provide tax relief for small businesses that do not operate as C-corporations."[84] In connection with its initial summary of the cost of the TCJA, JCT estimated that Section 199A alone would cost taxpayers more than $415 billion over ten years.[85] Notwithstanding the fact that JCT estimated the corporate tax rate cut cost taxpayers more than three times Section 199A (i.e., approximately $1.3 trillion in fiscal years 2017–2027), according to the legislative history,

83. *See* JCX-55-19, *supra* note 18, at Table 1 (estimating the cost of the following provisions from 2019-2023: (i) expensing under Section 179 of depreciable property ($59.9 billion); and (ii) Section 199A, which is a 20 percent deduction for qualified business income ($233.5 billion)); *see also* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 4 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (analyzing JCT's analysis that more than 90 percent of the revenue loss generated from the new deduction will flow to firms with income of over $100,000); *Expanding Opportunities for Small Businesses Through the Tax Code: Hearing of the S. Comm. on Small Bus. & Entrepreneurship*, 115th Cong. 4 (2018) [hereinafter *Expanding Opportunities for Small Businesses Hearing*] (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (noting that tax investments of the TCJA were not robustly investigated with respect to WBOs in connection with Congress' efforts on tax reform).

84. Judith Folse Witteman, *Sec. 199A: Regulations Shed Light on QBI Deduction*, J. ACCOUNTANCY (Feb. 1, 2019), https://www.journalofaccountancy.com/issues/2019/feb/irs-sec-199a-qbi-deduction.html.

85. JCX-67-17 *supra* note 18, at 1.

Section 199A "reflects Congress's belief that a reduction in the corporate income tax rate does not completely address the Federal income tax burden on businesses."[86] While Congress may have reasoned that a new deduction for business income would benefit small businesses not otherwise able to take advantage of a 21 percent corporate tax rate, Section 199A's complexity has proven to be challenging even for experienced tax professionals and planners.[87] In fact, one commentator went so far as to note:

> [S]ection 199A's twenty-percent deduction is far more restrictive than the simple reduction in the C corporation tax bracket to a flat twenty-one percent rate . . . [and] is a needlessly complex labyrinth filled with ambiguous language that opens the unwary taxpayer to possible missteps and an easier to meet accuracy-related penalty for substantial understatement of tax liability.[88]

In general, Section 199A is a deduction "of up to 20 [percent] of income from a domestic business operated as a sole proprietorship or through a partnership, S-corporation (as defined in section 1361(a)(1)), trust, or estate."[89]

The deduction amount is "generally equal to the lesser of 20 [percent] of combined qualified business income (QBI) . . . or 20 [percent] of taxable income less net capital gain."[90] For purposes of Section 199A, QBI is "for any tax year, the net amount of qualified items of income gain, deduction, and loss with respect to any qualified trade or business of the taxpayer."[91] In 2019, the full deduction was available to married taxpayers filing joint returns ("MFJ") with taxable income below $321,400 and for taxpayers filing as single or head-of-household with taxable income below $160,700.[92] For taxpayers with incomes above those amounts but below $421,400 in the case of MFJ, or $210,700 in the case of single or head of

86. JOINT COMM. ON TAXATION, JCS-1-18, GENERAL EXPLANATION OF PUBLIC LAW 115-97, 20 (Dec. 2018), https://www.jct.gov/publications.html?func=startdown&id=5152; *see also* CRS199A REPORT, *supra* note 48.

87. *See* Craig Benson, *Section 199A: A Magic Dance Through the Labyrinth,* 58 WASHBURN L.J. 187, 214 (2019) ("The method and speed at which the TCJA became law resulted in cryptic statutory language with little legislative history, leaving the tax community in desperate need of guidance.").

88. *Id.* at 187 (emphasis added).

89. Qualified Business Income Deduction, 84 Fed. Reg. 27, 2952 (Feb. 8, 2019) [hereinafter QBI DEDUCTION REGULATIONS], https://www.federalregister.gov/documents/2019/02/08/2019-01025/qualified-business-income-deduction.

90. Witteman, *supra* note 84.

91. *Id.*

92. *See id*.

household filings, certain limitations apply to phase-out the deduction.[93] Notwithstanding these and other limitations, the IRS estimates that at least ten million taxpayers will benefit from the new Section 199A deduction and that the time it takes to calculate the deduction will range from "[thirty] minutes to [twenty] hours, depending on individual circumstances, with an estimated average of 2.5 hours."[94]

Importantly for WBOs, the majority of whom operate service businesses,[95] if a taxpayer is (i) a "specified service trade or business" (SSTB); and (ii) has taxable income above the Section 199A income and phase-out thresholds, the deduction is unavailable altogether.[96]

Specifically, Section 199A(d)(1) provides that a "qualified trade or business" is any trade or business *other than* a SSTB, or the trade or business of performing services as an employee.[97] The text of Section 199A(d)(2)(A) defines a SSTB to mean "any trade or business, which is described in section 1202(e)(3)(A) (applied without regard to the words, engineering, architecture)."[98] In effort to aid taxpayers navigating Section 199A, the IRS summarizes the relevant language from Section 1202(e)(3)(A) on its website and explains that a SSTB is:

> [A] trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, investing and investment management, trading, dealing in certain assets or any trade or business where the principal asset is the reputation or skill of one or more of its employees or owners.[99]

In February 2019, IRS and Treasury issued final regulations explaining the calculation for the Section 199A deduction, which included guidance on what businesses qualify as SSTBs.[100] For purposes of Section 199A, a trade or business where the principal asset is the reputation or skill of one of its employees is limited to businesses "that receive income for endorsing

93. I.R.C. § 199A(e)(2) (showing that the thresholds and phase-out amounts for married, filing separate taxpayers for 2019 were: $160,725 to $210,725; for tax years beginning after 2018, the threshold and phase-out amounts are indexed to inflation).

94. QBI DEDUCTION REGULATIONS, *supra* note 89, at 2952.

95. *See supra* Part II(A) (discussing that most women owned firms are small business firms).

96. *See* I.R.C. § 199A(d)(1) (West 2019).

97. *Id*. (emphasis added).

98. *See id.* §199A(d)(2)(A).

99. *Tax Cuts and Jobs Act, Provision 11011 Section 199A – Qualified Business Income Deduction FAQs*, IRS, https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-qualified-business-income-deduction-faqs (last updated Jan. 10, 2020).

100. *See* QBI DEDUCTION REGULATIONS, *supra* note 89, at 2969.

products or services; license or receive income for the use of an individual's image, likeness, name, signature, voice, trademark or any other symbols associated with the individual's identity; or receive appearance fees or income."[101]

The regulations mirror Congress' decision to specifically incorporate language from an existing Code provision, Section 1202(e)(3)(A), which is a small business tax expenditure designed to provide access to capital to certain small businesses through the Code.[102] However, existing tax research made available to Congress in June 2017 found that Section 1202 is a direct reflection of the billion dollar blind spot Congress has when it comes to WBOs and small business tax expenditures.[103] Specifically, the legislative history and absence of research on Section 1202's effectiveness indicates a dubious-at-best track-record, and more importantly, that it excludes the majority of service firms, and by extension, the majority of WBOs.[104]

Specifically, when Congress developed Section 1202 in 1993, the intent was generally understood to "encourage the flow of capital to small businesses, many of which have difficulty attracting equity financing"[105] and to "promote long-term investments in small businesses and venture capital startups by providing a partial exclusion of gain on the sale qualified small business stock."[106] In particular, Congress designed Section 1202's partial capital gain exclusion to:

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101. Witteman, *supra* note 84.

102. BDBS, *supra* note 1, at 14–15 (explaining the legislative history of Section 1202 and Congress' intent to provide access to capital for eligible small businesses).

103. *See* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 47–48 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (showing that congressional limitation of certain service firms from eligibility explicitly excludes a majority of women-owned firms); *Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 29, 34 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (citing survey research that found only three WBOs had used IRC § 1202 to raise capital).

104. BDBS, *supra* note 1, at 3, 17 (confirming this finding to a certain degree: of 515 WBO respondents, only three (or less than .6%) indicated they had been able to attract capital for their corporation from non-corporate investors using Section 1202; notably, the IRS does not publish or track data on Section 1202 and women-owned firms); *see* Alan D. Viard, *The Misdirected Tax Debate and the Small Business Stock Exclusion*, 134 TAX NOTES 737 (2012) (noting the debate on whether this tax expenditure levels the playing field).

105. H.R. REP. NO. 103-111, at 600.

106. BDBS, *supra* note 1, at 16 (citing Beckett G. Cantley, *The New Section 1202 Tax-Free Business Sale: Congress Rewards Small Businesses that Survived the Great Recession*, 17 FORDHAM J. CORP. & FINANCIAL LAW 1 (2012)).

> [F]acilitate the formation and growth of small C-corporations involved in commercial development of new technologies by increasing their access to relatively patient capital . . . by giving investors (individuals such as angel investors as well as venture capital funds organized as partnerships) an incentive to acquire significant equity stakes in such firms.[107]

Although originally intended to help small research-intensive manufacturing firms, the legislative history of Section 1202 indicates that Congress subsequently amended Section 1202, and ultimately eliminated tax on gains from these investments altogether in 2010, to "encourage new and additional investment in small businesses" in the hopes that "access to additional capital will help the small businesses expand and create jobs."[108]

Nevertheless, since 1993, government and academic research has found that "there is no conclusive evidence that the provision has had the intended effect of increasing the flow of equity capital to eligible firms."[109] In addition, tax experts have criticized it "as ineffective due to its many limitations, including its application to selected industries."[110] Moreover, once Congress reduced the top capital gains rate to 15 percent in 2003, "tax advisers saw little reason to pursue a provision that came with a host of requirements yet yielded a tax rate benefit of less than 1 [percent]."[111] Section 1202 has gone largely unused since its enactment[112]; however, congressional tax expenditure estimators still anticipate that it will cost taxpayers at least $6.9 billion in lost revenue from 2019–2023.[113]

Notwithstanding the lack of IRS data on the effectiveness of Section 1202 and research that indicates it excludes the majority of women-owned firms,[114] Congress incorporated Section 1202's provisions with respect to

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107. *Id.* at 15; *see also* Cantley, *supra* note 106, at 5 (stating that Section 1202 was created to promote long-term investment in small businesses).

108. BDBS, *supra* note 1, at 15.

109. *Id.* (citing CONG. RESEARCH SERV, *Tax Expenditures: Compendium of Background Material on Individual Provisions* (Dec. 2016), https://www.govinfo.gov/content/pkg/CPRT-114SPRT24030/pdf/CPRT-114SPRT24030.pdf).

110. *See*, *e.g.*, Viard, *supra* note 104, at 737 ("[T]argeting particular sectors for tax relief tilts the economic playing field and misallocates economic resources, unless the targeted sector is initially taxed more heavily than others, in which case the targeting actually helps level the playing field.").

111. Tony Nitti, *Qualified Small Business Stock Gets More Attractive*, THE TAX ADVISOR (Nov. 1, 2018), https://www.thetaxadviser.com/issues/2018/nov/qualified-small-business-stock-more-attractive.html (explaining that Section 1202 has become more obsolete with each reduction in the long-term capital gains rate).

112. *See id.*

113. JCX-55-19, *supra* note 18, at Table 1.

114. *See* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 5–6 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing

service firms into the operational rules of Section 199A for purposes of defining SSTBs.[115] Notably, Section 199A does not eliminate the deduction for qualified business income of SSTBs until a taxpayer has taxable income above the threshold and phase-out amounts. Most WBOs will be able to claim some portion of the Section 199A deduction as the overwhelming majority of WBOs have revenues below $100,000 (almost 90 percent).[116] At the same time, at least half of WBOs are concentrated in three industries: other services, health care and social assistance, and professional/scientific/technical services[117] that would render them ineligible for any Section 199A deduction in the event they have revenues over the threshold and phase-out amounts.

In addition, JCT estimates on the distribution of the overall revenue loss of Section 199A suggest that the provision is, in fact, less favorable to WBOs.[118] For example, according to Table 3 of JCT's distributional analysis of the TCJA, more than 90 percent of the revenue loss generated from the new deduction under IRC § 199A will flow to firms with income of *more than* $100,000 in 2018 and 2024.[119] This inequitable distribution is even more pronounced when considered at higher income levels: only 1.7 percent of women-business owners have receipts of $1,000,000 or more,[120]

Director, Kogod Tax Policy Center Kogod School of Business, American University) (noting that Section 1202 is so limited that women-owned firms are effectively excluded); *see also Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 5 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (explaining that there is no publicly-available data to show the limited utility of Section 1202).

115. *See* I.R.C. § 199A(d)(2) (2018).

116. *See supra* Part II.A and Table 1.

117. 2019 AMERICAN EXPRESS REPORT, *supra* note 12, at 11.

118. *See Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 7 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (explaining that JCT's distributional analysis of the revenue loss of Section 199A suggests that the tax benefits of Section 199A will not be felt by the majority of women business owners); 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 6 (statement of Caroline Bruckner Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (finding that JCT's analysis supports a finding that key tax investments are less favorable to women); *see also*, Ari Glogower, *The Rhetoric and Reality of Small Business Preferences in the 2017 Tax Legislation*, 16 THE FORUM 441, 448 (Nov. 30, 2018), https://doi.org/10.1515/for-2018-0030 (reviewing JCT distributional analysis with respect to Section 199A).

119. *See* JOINT COMM. ON TAXATION, JCX-32R-18, TABLES RELATED TO THE FEDERAL TAX SYSTEM AS IN EFFECT 2017 THROUGH 2026 4 (2018), [hereinafter JCX-32R-18], https://www.jct.gov/publications.html?func=startdown&id=5093.

120. *See supra* Part II.A and Table 1.

but JCT found in 2018 that 44 percent of the IRC § 199A will flow to pass-through businesses with $1,000,000 of income.[121] Further, JCT projects that the 44 percent will increase to 52 percent by 2024.[122]

The estimates show that the majority of the revenue Congress spent in Section 199A flows to firms other than the majority of WBOs, which are more than forty percent of all U.S. firms. To determine whether this is an intended investment by Congress, the tax-writing committees should conduct oversight on the design and distribution of Section 199A with respect to WBOs as the JCT estimates suggest that Congress doubled-down on its billion dollar blind spot when it comes to women-owned firms and tax expenditures.[123]

While most WBOs will no doubt see some limited benefit from IRC § 199A, JCT's distributional analysis raises serious questions as to whether the provision as designed adequately reflects congressional intent with respect to women-owned firms, 99 percent of which are small businesses.[124] As discussed *supra*, Congress intended Section IRC § 199A to operate as a tax cut for small businesses comparable to the TCJA's

121. JCX-32R-18, *supra* note 119, at Table 3; *see also* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 6 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (stating that only a small percentage of women business owners will see a benefit from Section 199A); *Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 7 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (showing that the majority of women business owners will not benefit from Section 199A).

122. *See* JCX-32R-18, *supra* note 119, at Table 3.

123. On April 24, 2018, SFC held a hearing titled, "Early Impressions of the New Tax Law." The author submitted a statement for the record explaining how the estimates set forth in JCX-32R-18 suggest Congress' investments in Section 199A and Section 179 would be less favorable to WBOs. *See generally Early Impressions of the New Tax Law*: *Hearing Before the S. Fin. Comm.*, 115th Cong. (2018), https://www.govinfo.gov/content/pkg/CHRG-115shrg38066/html/CHRG-115shrg38066.htm (statement by Caroline Bruckner). In addition, on May 23, 2018, the W&M subcommittee on tax policy held a hearing titled, *Hearing on Tax Reform and Small Businesses: Growing Our Economy and Creating Jobs*, to consider the impact of tax reform on small businesses. On May 22, 2018, at the request of W&M staff, the author prepared a statement for the record explaining JCT's distributional analysis of the revenue loss of Section 199A as set forth in JCX-32R-18 and suggested that the TCJA tax benefits of Section 199A and Section 179 would not be felt by the majority of women business owners (emails on file with author). During the hearing, W&M Member, Rep. Linda Sanchez (D-CA), entered the author's statement and supporting report into the record. *Hearing on Tax Reform and Small Businesses: Growing Our Economy and Creating Jobs: Hearing Before the H. Subcomm. On Tax Policy*, 115th Cong. (2018), https://docs.house.gov/meetings/WM/WM05/20180523/108364/HHRG-115-WM05-Transcript-20180523.pdf.

124. *See supra* Part II.A.

generous corporate tax rate cut. However, JCT's revenue loss distribution suggests that the overwhelming majority (more than 90 percent) of the money spent for this single tax provision will flow to firms *other than* the majority of WBOs who have revenues below $100,000.

Similarly, research suggests additional oversight is warranted with respect to the TCJA's investments into expanding IRC § 179 as it too will be of limited benefit to WBOs.

### *B. Section 179 – Accelerated Depreciation for Investments in Tangible Property for Small Businesses*

In addition to the $414.5 billion Congress initially spent on Section 199A, Congress also invested an additional $25.9 billion enhancing Section 179, an existing small business tax expenditure, as part of TCJA.[125] Section 179 is a popular tax expenditure that has resided in the Code since 1958 and it allows businesses to deduct up to a specified amount of the cost of qualified assets (mostly machinery and equipment) in the year the assets are placed in service.[126] The Section 179 deduction includes two notable limitations: (1) the deduction cannot exceed a taxpayer's income from their trade or business; and (2) the deduction is phased out dollar for dollar when a taxpayer's total spending on qualified assets exceeds a specific threshold amount.[127]

In 2017, prior to the TCJA, Section 179's maximum deduction was $510,000 of qualified property placed in service that year and the phase-out threshold was $2,030,000.[128] If a "business' total investment in qualified property was greater than the phase-out threshold, the maximum expensing allowance was phased out dollar for dollar, with the business no longer eligible for Section 179 expensing when its investment in qualified property for the year reached $2,540,000 or more."[129]

In connection with announcing their goals for 2017 tax reform legislation, policymakers indicated a desire to "enhance unprecedented

125. JCX-67-17, *supra* note 18, at 3.

126. *See* BDBS, *supra* note 1, at 18. At the time Congress enacted Section 179, it intended to "reduce the tax burden on small firms, give them an incentive to invest more, and simplify their accounting." *Id*. at 19. Since 1958, Congress has enhanced Section 179 regularly, by "raising the expensing allowance and increasing the phase-out threshold to 'boost the economy and lower the tax burden on small business owners at the same time.'" *Id*.

127. *See* I.R.C. § 179(b)(3) (2018).

128. Alice E. Keane, *Immediate Expensing: How TCJA Made Depreciation Unnecessary for the Next Five Years*, 129 J. TAX'N 21, 24 (2018) (discussing changes in expense allowances in Section 179).

129. *Id.*

expensing for business investments, especially to provide relief for small businesses."[130] To make good on this promise, Congress increased the maximum expensing deduction to $1 million and the corresponding phase-out threshold to $2.5 million starting in tax years beginning after 2017.[131] Effectively, beginning in 2018, "businesses can depreciate up to $1 million of the basis of qualified property placed in service in the tax year, as long as their total investment is $2.5 million or less, after which any investment over that amount is phased out dollar for dollar up to $3.5 million."[132]

In 2016, Treasury issued a report (the "2016 Treasury Report") measuring the uptake of Section 179 among firms using IRS data from 2002–2014.[133] The report found that the "take-up rates were relatively high for Section 179 expensing . . . generally in the 70 [percent] or 80 [percent] range for C-corporations and S-Corporations, and somewhat lower at around 60 [percent] to 70 [percent] for partnerships and individuals."[134] However, the 2016 Treasury Report failed to offer any insight whatsoever as to the uptake by women-owned firms.[135] This data analysis gap is relevant because other small business research suggests, "that accelerated depreciation allowances are not necessarily universally good for small businesses."[136]

Notably, in 2017 during the tax reform debate, research and WBO survey data on Section 179 indicated that a majority of the WBOs surveyed do not "fully benefit from Section 179 either because they don't know about it or don't regularly make use of it."[137] Post-tax reform, JCT

130. Unified Framework, s*upra* note 16, at 7.

131. Keane, *supra* note 128.

132. *Id.*

133. *See* John Kitchen & Matthew Knittel, *Business Use of Section 179 Expensing and Bonus Depreciation, 2002-2014*, OFFICE OF TAX ANALYSIS 1 (2016) [hereinafter 2016 TREASURY REPORT], https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-110.pdf; *see also* BDBS*, supra* note 1, at 18–19 (comparing the Treasury report with the results of the BDBS survey); *Expensing More Popular Than Bonus Depreciation, Treasury Study Shows*, FRAZIER & DEETER (Dec. 28, 2016), https://www.frazierdeeter.com/insights/expensing-more-popular-than-bonus-dep reciation-treasury-study-shows/ (breaking down the Treasury's study of Section 179).

134. 2016 TREASURY REPORT, *supra* note 133, at 1.

135. BDBS, *supra* note 1, at 19.

136. *See*, *e.g.*, BDBS, *supra* note 1, at 19; (citing Don Bruce, John Deskins & Tami Gurley-Calvez, *Depreciation Rules and Small Business Longevity*, 3 J. ENTREPRENEURSHIP & PUB. POL'Y 10, 26 (2014)). *But see* Kyle Pomerleau, *Full Expensing Spurs More Investment than a Corporate Rate*, TAX FOUNDATION (May 3, 2017), https://taxfoundation.org/full-expensing-corporate-rate-investment (arguing that full expensing may be preferable to tax cuts for larger firms).

137. BDBS *supra* note 1, at 20; Campbell, *supra* note 25; *see also* Anne Bauer, *We Can Do It? How the Tax Cuts and Jobs Act Perpetuates Implicit Gender Bias in the*

estimates Section 179 is one of the most expensive tax expenditures targeted to help small businesses and will cost taxpayers almost $60 billion from 2019–2023 in lost revenue.[138] At the same time, there is no official government data on the uptake rates of Section 179 by women-owned firms — 99.9 percent of whom are small businesses.[139] Congress' additional $25.6 billion investment in Section 179 — absent any review or consideration as to whether it would benefit WBOs as a means of accessing capital — reflects the doubling down on a billion dollar blind spot policymakers have with respect to how the Code's small business tax expenditures impact these thirteen million small businesses.

## V. CONGRESSIONAL ACTION POST-TCJA

Although congressional tax writers did not specifically consider or address the access to capital challenges WBOs have during the 2017 development of and debate over TCJA, since then, SFC Ranking Member, Sen. Ron Wyden (D-OR), has worked to remedy this oversight. Beginning in Spring 2019, Sen. Wyden's SFC staff repeatedly solicited input and policy recommendations from WBO experts and stakeholders on how the Code could address WBO access to capital challenges.[140]

On Oct. 30, 2019, Sen. Wyden introduced the *Providing Real Opportunities for Growth to Rising Entrepreneurs for Sustained Success (Progress) Act (S. 2738)*.[141] In connection with the bill's introduction, Wyden announced his intention to specifically address the challenges WBOs have stating, "[w]omen business owners, particularly women of color, are underestimated, underrepresented and undercapitalized . . . [e]xisting tax incentives do not do nearly enough to help women-owned small businesses. Our bill would diminish these gaps and help women-owned businesses hire and grow." The bill includes two new tax incentives targeted to WBOs, the overwhelming majority of which have revenues below $100,000, including:

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*Code*, 43 HARV. J.L. & GENDER 1 (2019), https://ssrn.com/abstract=3353324.

138. JCX-55-19, *supra* note 18, at 24.

139. BDBS, *supra* note 1, at 11, 19, 27 (referring to lack of government data on women owned firms utilizing Section 179 and Treasury's definition of a "small business" that is discussed in more detail in footnote 34 of the article); *see* McManus, *supra* note 37.

140. Press Release, Senator Wyden, Wyden Introduces Bill to Boost Capital Access for Women-Owned Business (Oct. 30, 2019), https://www.finance.senate.gov/ranking-members-news/wyden-introduces-bill-to-boost-capital-access-for-women-owned-business. Author repeatedly met with SFC staff on developing legislation to help WBOs (notes on file with author).

141. *Id*.

> 1. A new first employee credit equal to 25 percent of W-2 wages reported would be claimed annually, up to $10,000 in a single tax year, with a lifetime limit of $40,000 against the business' payroll tax liability. Eligible businesses must be majority owned by U.S. individual(s) that each earn $100,000 or less per year ($200,000 in the case of joint filers); and
> 2. A new investment credit to encourage third-party capital investment of up to 50 percent of a qualified debt or equity investment can be claimed, up to $10,000 in a single tax year, with a lifetime limit of $50,000. Eligible businesses must have at least one full-time equivalent employee and be majority owned by U.S. individual(s) that each earn $100,000 or less per year ($200,000 in the case of joint filers).[142]

S. 2738 is an encouraging first step in acknowledging the role the Code could play in remedying the challenges WBOs face in accessing capital.[143] However, Congress needs more data on these issues, particularly with respect to hearing from women business owners during committee hearings.

In view of Congress' additional investments in tax expenditures targeted to small businesses in connection with TCJA, there is an even greater urgency for congressional tax-writing committees to conduct oversight and request tax research regarding WBOs use of tax expenditures post tax reform.[144] The existing absence of data and research on these issues "is contrary to recent congressional efforts to engage in evidenced-based policymaking."[145] To that end, at a minimum, the congressional tax-writing committees should consider implementing the following recommendations to gain a better understanding of how small business tax expenditures impact women-owned businesses:

> 1. Hold hearings to consider the impact of Code's small business tax expenditures on women-owned small businesses;

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142. *Id.*

143. 2019 NWBC ANNUAL REPORT, *supra* note 28, at 17.

144. 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 3 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (discussing lack of data for women-owned firms and information in footnote 13); *Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 6 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (discussing the need for Congress to conduct oversight and research on the impact of tax expenditures on women-owned businesses); *see* Peter G. Pupke, *Minnesota Governor Signs Omnibus Tax Bill Updating IRC Conformity, Reducing Income Tax Rate, and Enacting Other Changes*, J. MULTISTATE TAX'N 32, 35 (2019) (discussing how the TCJA affects women-owned businesses).

145. BDBS, *supra* note 1, at 22.

> 2. Task the U.S. Government Accountability Office (GAO) with preparing a report detailing recommendations on how Treasury, IRS, SBA and JCT can coordinate to develop the data needed to prepare an assessment of the distribution of existing small business tax business with respect to WBOs. GAO's recommendations should include discussions of and recommendations on protecting taxpayer privacy data in connection with using tax return information to develop the necessary data;
> 3. Develop voluntary witness disclosure statements for individuals testifying before the tax-writing committees. Such statements should ask witnesses to volunteer information with respect to their gender, race, ethnicity, and veteran status;
> 4. Amend the tax-writing committee rules to require staff include voluntarily-provided demographic data of witnesses testifying before the committees in EOC reports and in hearing transcripts; and
> 5. Charge the JCT with preparing a formal estimate of the distribution of the revenue loss of small business tax expenditures with respect to women business owners.

Looking forward to the 117th Congress, members of the JCT, specifically the Chair and Vice Chair, should draft language for adoption at the organizational meeting of JCT in the 117th Congress that mandates JCT include distributional analysis of all business tax expenditures with respect to women-owned firms, together with its revenue estimates for publication.

## VI. CONCLUSION

Congress has a billion dollar blind spot when it comes to women business owners and small business tax expenditures, which is not surprising, considering that the committees charged with oversight of tax issues have yet to fully investigate or consider how the Code impacts women business owners. In fact, the tax-writing committees have yet to hold a hearing on these issues. But just as concerning as the notable absence of any tax-writing committee hearing on women business owners is the persistent underrepresentation of women as witnesses before the committees altogether. Although women-owned firms have grown exponentially in number in recent decades to now number almost thirteen million (42 percent of all U.S. firms in 2019), the overall participation of women as witnesses at tax-writing committee legislative hearings remains disproportionately low. In fact, no women testified at 45 percent of the total tax reform hearings the tax-writing committees held during the 110th through the 115th Congresses. Although women did testify at more than half of the total tax reform hearings, women represented only 17.5 percent of the total 462 witnesses who testified. The absence of women testifying before the tax-writing committees was not limited to hearings on tax

reform; from the 110th through the 115th Congresses, of the 3,627 witnesses who testified at 834 legislative, oversight, or investigative hearings the tax-writing committees held, more than 75 percent were men. But more stunningly: women did not testify at all at 332 (almost 40 percent) of the hearings the tax-writing committees held during this period. Data is not (yet) available as to the number of women of color who testified before these committees, but given the existing data on women's representation as witnesses, it is unlikely that it would reflect the fact that women of color account for 50 percent of all women-owned businesses.

The consequence of failure to solicit testimony from women generally and develop data on how tax expenditures impact WBOs specifically is nothing short of a doubling down on a billion dollar blind spot. Congress does not have the data or testimony to determine whether money it spends through tax expenditures helps these small businesses access capital as intended. This is most vividly illustrated by JCT's estimates on the distribution of the revenue loss for Section 199A showing that more than 90 percent of the revenue will go to firms with revenues greater than $100,000. Similarly, existing tax research on WBOs indicates that women-owned firms claim Section 179 at significantly lower rates than existing government research finds for small firms generally. Section 179 is one of the most expensive small business tax expenditures in the Code and will now cost taxpayers almost $60 billion in the coming years, and yet Congress does not have research regarding the benefits to women business owners. At the same time, what government research that does exist reiterates the ongoing challenges WBOs face growing their revenue and accessing capital.

In the wake of the economic devastation triggered by COVID-19, there is an even greater urgency for Congress to invest in firms and to consider what levers exist in the Code to help businesses recover. As part of that process, Congress needs to consider the specific challenges women-owned firms have accessing capital to aid in their recovery. Failure to consider these issues could fundamentally undermine congressional intent to help these small businesses survive.

* * *

# PROSECUTING FOREIGN BRIBERY IN NATIONAL PROJECTS: A MULTI-PHASED APPROACH TO REDUCE CORRUPTION

JULIA E. JOHNSON*

"Without strong watchdog institutions, impunity becomes the very foundation upon which systems of corruption are built. And if impunity is not demolished, all efforts to bring an end to corruption are in vain."
– Rigoberta Menchú Tum (2001).[1]

*The gradual establishment of an international mechanism to review and prosecute allegations of corruption could help to deter fraudulent conduct. Fraudulent conduct often reduces the economic benefits associated with large-scale development or investment projects.[2] These projects are generally awarded through contract bidding; the bidding outcome may be dictated by bribery and other corrupt behaviors by local officials overseeing the project. The money earmarked for the project may in turn be siphoned off to the bribe recipients for private gain, leaving citizens unable to appreciate the fruits of any such project. For this reason, reducing corruption should remain a key priority. Many national jurisdictions have a vested interest in reducing corruption, yet lack the capacity and political stability to reduce corruption through domestic efforts.[3] International efforts to reduce corruption, as evidenced by previous attempts at developing new, topic-specific, stand-alone international courts, have also been insufficient.[4]*

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* J.D., Duke University School of Law. The author would like to thank her former colleagues at the World Bank for their input on this article.

1. *Global Corruption Report 2001*, TRANSPARENCY INTERNATIONAL, https://issuu.com/transparencyinternational/docs/2001_gcr_inaugural_en (Oct. 13, 2001).

2. *See Combatting Corruption*, THE WORLD BANK [hereinafter *Combatting Corruption*], http://www.worldbank.org/en/topic/governance/brief/anti-corruption (last updated Oct. 4, 2018).

3. *See id.* (describing consequences of corruption).

4. *See* Marie Chêne, *Successful Anti-Corruption Reforms*, TRANSPARENCY INT'L, 1, 4 (Apr. 30, 2015), https://www.transparency.org/files/content/corruptionqas/Successful_anti-corruption_reforms.pdf; *see also* Maíra Martini, *Anti-Corruption*

*Mindful of the mixed results of previous anti-corruption efforts, this Article proposes a new anti-corruption framework, based upon a hybrid, multi-phased approach. The approach is pragmatic, flexible, cost-effective, and realistic.*

*Step-by-Step Approach:*

1. *Create a new, unified anti-corruption and anti-bribery prosecutorial sanctions board and system for national governments, multilateral development banks ("MDBs"), and United Nations ("U.N.") agencies to investigate and prosecute allegations of fraudulent conduct. The specific structure of the unified board is not described in depth here, but the envisioned structure would be changed over time pursuant to its charter such that it transitions into a more involved governing body that prosecutes both government and civilian corruption. As the board gains legitimacy, jurisdiction will be gradually expanded pursuant to ratification by its signatories.*
2. *Install requirements for information sharing by pursuing joint investigations and case oversight efforts. These requirements will facilitate the new board's access to information and serve as a potential conduit for information sharing between national agencies facing cross-border corruption.*
3. *Expand the board to oversee civil administrative actions against civil servants accused of bribery and corruption. National judicial and legal systems would assist with enforcing decisions issued by the board.*
4. *Expand the board to oversee criminal bribery and corruption cases against civil servants as well as certain outside matters brought before the board. The precise parameters of this jurisdiction are not explored here. The intention for such a board at this phase is to prosecute civil and criminal wrongdoing by civil servants and would not prosecute allegations of wrongdoing by private actors.*
5. *Once the board has gained legitimacy and has developed efficiency, an international anti-corruption "court" may be created, though the proposed structure should not carry the rigidities associated with prior efforts to create an international prosecutorial body. Instead, provisions must be installed to ensure that the court remains fiscally effective and practical. At this point, the court's jurisdiction would include prosecution of civil and*

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*Specialisation: Law Enforcement and Courts*, TRANSPARENCY INT'L, 1, 8–10 (Jan. 28, 2014), https://knowledgehub.transparency.org/assets/uploads/helpdesk/Anti-corruption_specialisation_Law_enforcment_and_courts_2014.pdf (analyzing the effectiveness of specialized corruption courts in Croatia, Bulgaria, and Slovakia).

*criminal wrongdoing by civil servants relating to large-scale projects associated with MDBs, U.N. agencies, and similar entities, as well as prosecution of large-scale cross-border corruption for which a national government may be unable to adequately address without outside assistance.*

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## I. INTRODUCTION

Corruption, which is particularly rampant in developing nations, reduces the benefits associated with large-scale projects. By some metrics, global

corruption by public officials causes losses measuring approximately one trillion dollars annually.[5] Corruption, spurn out of human proclivities for greed and desire for illicit gain, is unlikely to ever be wholly eradicated even under the most effective legal framework. However, with proper safeguards, international corruption and its corresponding losses can be significantly reduced. To achieve this goal, a hybrid, multi-phased approach must be employed.

Before refining the existing anti-corruption framework, a general explanation of certain laws and treaties is warranted. In the private sector, the national governments are responsible for prosecution of corruption associated with large-scale projects. There are international treaties that require signatory nations to adopt anti-corruption laws within their jurisdictions. There is, however, no supranational overarching mechanism investigating and prosecuting international corruption, particularly as it affects the procurement and development of large-scale projects that require government participation.

Like private sector procurement anti-corruption efforts which are largely prosecuted by national governments, corruption associated with bidding awards by multilateral development banks ("MDBs") is also prosecuted in a piecemeal fashion — current anti-corruption efforts are typically comprised of debarment sanctions honored through reciprocity.[6] These treaties are fragmented in nature, with differing obligations at the national and international levels.[7] For example, a development bank may have a sanctions board that will sanction a particular entity once it is found to have engaged in corruption. Other sanctions boards need not necessarily consider the decisions imposed by another sanctioning entity and may instead chose to award certain large-scale contracts notwithstanding prior evidence of corruption and bribery. To this end, a unified sanctions board, comprised of a prosecutorial body and utilizing the assistance of national police and judicial assistance, may assist with deterring corrupt behaviors in large-scale, cross-border projects, as well as other acts of civil service

5. *See* Rodrigo Campos, *Corruption Costs $1 Trillion in Tax Revenue Globally: IMF*, REUTERS (Apr. 4, 2019, 10:10 AM), https://www.reuters.com/article/us-imf-corruption/corruption-costs-1-trillion-in-tax-revenue-globally-imf-idUSKCN1RG1R2.

6. *See generally* THE WORLD BANK, THE WORLD BANK GROUP'S SANCTIONS REGIME: INFORMATION NOTE [hereinafter INFORMATION NOTE], http://siteresources.worldbank.org/EXTOFFEVASUS/Resourcces/The_World_Bank_Group_Sanctions_Regims.pdf (last visited Apr. 25, 2020) (describing World Bank's cross-debarment policy, through which an MDB can sanction a party that has already been sanctioned by another MDB).

7. *See id.* at 9 (explaining that MDBs may opt out of debarment decisions as part of the Bank's cross-debarment policy).

corruption for which a national government (or, if the bidding award was issued by an MDB, its respective sanctions board) may be unable to adequately prosecute.

First, this Article reviews the need for an international anti-corruption enforcement body by reviewing the prevalence of corruption. Second, this Article considers the limitations of similar stand-alone, international courts. Third, this Article proposes creation of a new, unified prosecutorial sanctions board to oversee the review instances of corruption and bribery, as well as the possible use of certain enforcement mechanisms at the national and international level. Fourth, this Article discusses the need for a gradual phased expansion of the proposed sanctions system. Particularly, this Article will focus on the need for information sharing among and between agencies and national governments and the proposed board. It will further note the weaknesses inherent in the existing systems and ways to address them.

Lastly, the Article proposes a multi-phased approach for establishing an international mechanism for prosecuting corruption cases, including the creation of a new international anti-corruption court. The suggested framework could be expanded over time to address administrative actions and criminal cases against civil servants. As the anti-corruption court gains legitimacy, the court could also investigate and prosecute acts of corruption affecting both the private and public sectors. The court's jurisdiction should be described in its charter and ratified by its signatories as its authority increases.

## II. SCALE OF THE PROBLEM OF CORRUPTION

Despite its significant effect on the efficacy of development projects and the quality of life of the affected persons, corruption cannot be encapsulated by a single definition.

### *A. Definition of Corruption*

Scholar Linn Hammergren defines corruption as the "abuse or misuse of public resources" (material resources, including funds and equipment, and less tangible resources such as power, decision-making authority, and position) for "private benefit."[8] Corruption is defined under the World

8. *See* Linn Hammergren, *The Multilateral Development Banks and Judicial Corruption*, 9 CTR. FOR INDEPENDENCE JUDGES & LAWS. Y.B. 73, 75 (2000) (defining corruption as "abuse or misuse of public resources for private benefit" and explaining that objects of corruption include both material and nonmaterial resources, corrupt actors often include both public and private sector officials, and examples of corruption include kickbacks for government contracts and favorable legislation).

Bank Guidelines as "[t]he offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party."[9] Wrongdoing by recipients of large-scale projects can be one of several forms, including bribery, collusion, fraudulent practices, and obstruction.[10] In addition, Article 1 of the Organization of Economic Cooperation and Development ("OECD") Anti-Bribery Convention defines corruption as:

> any person intentionally to offer, promise or given any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[11]

Corruption may be one of many types — it may be (1) "mutual or unilateral," (2) "'soft' or 'hard,'" and (3) found in the contract's procurement or as the contract's objective.[12] Unilateral corruption means that only one party is involved, whereas multilateral corruption means that both the benefactor and the recipient are fully aware of the corrupt behavior.[13] Mutual corruption is seldom grounds for defense against a corruption allegation; unilateral corruption is more likely to be a valid defense.[14] Similarly, whether corruption is hard or soft is determined by

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9. *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loan and IDA Credits and Grants*, THE WORLD BANK 3 (July 1, 2016), https://policies.worldbank.org/sites/ppf3/PPFDocuments/40394039anti-corruption%20guidelines%20(as%20revised%20as%20of%20july%201,%202016).pdf.

10. *See* The World Bank Borrowers, *Guidelines — Procurement of Goods, Works, and Non-Consulting Services*, 6 ¶ 1.16(a)(i)–(iv) (revised July 2014) [hereinafter *Guidelines*] (defining corrupt practice, fraudulent practice, collusive practice, and coercive practice).

11. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1 ¶ 1, Nov. 21, 1997, OECD [hereinafter OECD Art. 1].

12. *See* Michael A. Losco, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L.J. 1201, 1218 (2014); *see also* Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C.J. INT'L L. & COM. REG. 83, 87 (2007) (describing legislation passed by Congress in response to an SEC investigation that discovered questionable payments made by U.S. firms to foreign governments).

13. *See* Fragport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 332 (Aug. 16, 2007) (holding multilateral corruption present where both parties were knowingly aware of an illegal intent). *See generally* ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 18 (2012) (emphasizing the importance of differentiating between multilateral and unilateral conduct when categorizing case law and explaining that corruption is usually multilateral while fraud is usually unilateral).

14. *See, e.g.*, World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 156–57 (Aug. 31, 2006) (holding that even where it was alleged

the degree of interference. For instance, hard corruption often takes the form of an explicit offer by a benefactor made to a public official or other individual for some improper motive; hard corruption need not occur directly and may occur through an intermediary.[15] In contrast, soft corruption is an indirect form of corruption and involves the utilization of a middleman who alleges that he or she may be able to "influence peddle" another public official who wields authority.[16] Three out of four foreign bribery cases involve intermediaries.[17]

### *B. Measure of Corruption*

In 2014, the OECD estimated that the losses caused by public official corruption measured a trillion dollars per year.[18] The World Bank has likewise suggested that about twenty to forty percent of financial assistance provided for development in the poorest countries is squandered from the national public budget through corruption.[19]

Corrupt deals account for more than five percent of the global GDP.[20] The World Bank's research estimates that "around [$]20 billion to [$]40 billion a year — a figure equivalent to 15–30% of all Official Development Assistance" is lost due to bribery.[21] The effects of foreign bribery are

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corruption may be widespread within the particular sector of activity, the legal consequences are not to be altered).

15. *See* OECD Art. 1, *supra* note 10, ¶ 1; KULICK, *supra* note 13, at 309 (explaining that hard corruption requires an intentional act meant to gain an "undue advantage").

16. Losco, *supra* note 12, at 1220; Hilmar Raeschke-Kessler & Dorothee Gottwald, *Corruption in Foreign Investment — Contracts and Dispute Settlement Between Investors, States, and Agents*, 9 J. WORLD INV. & TRADE 5, 7 (2008) (defining influence peddling).

17. *See* THE WORLD BANK OFFICE OF SUSPENSION AND DEBARMENT, REPORT ON FUNCTIONS, DATA AND LESSONS LEARNED 2007-2013 29 (2014).

18. OECD, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: MEASURING OECD RESPONSES 73 (2014) [hereinafter MEASURING OECD RESPONSES], https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf.

19. OECD, *The Rationale for Fighting Corruption*, CLEANGOVBIZ (2014) [hereinafter *The Rationale for Fighting Corruption*], http://www.oecd.org/cleangovbiz/49693613.pdf ("The World Bank (Baker 2005) estimates that each year US$ 20 to US $ 40 of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas.").

20. *See* Mark L. Wolf, *The Case for an International Anti-Corruption Court*, BROOKINGS INSTITUTION: GOVERNANCE STUDIES 1, 8–9 (July 23, 2014), https://www.brookings.edu/research/the-case-for-an-international-anti-corruption-court/.

21. MEASURING OECD RESPONSES, *supra* note 18, at 73 ("A $1 million dollar bribe can quickly amount to a USD 100 million loss to a poor country through derailed projects and inappropriate investment decisions which undermine development.").

particularly pronounced in developing countries: between the years 2000 and 2009, corrupt financial practices resulted in $8.4 trillion in losses in these nations.[22]

Corruption also impacts the national economy through metrics that are less easily quantified. In addition to reducing cash flows, the harms caused by corruption comprise decelerated economic development and a number of trade flows issues, such as effects on public service and public procurement bids, including those for necessities such as electricity, roads, and water.[23] Foreign corruption is often concentrated within certain industry sectors, including transportation, mining, and infrastructure,[24] causing artificial economic imbalances in these industry sectors.[25] OECD research has found that corruption and bribery may result in excessive investment in more lucrative sectors such as large-scale infrastructure projects, while other less profitable sectors, such as education and public sector social programs, lose funding.[26]

Corruption constitutes a major impediment to economic development and growth.[27] As one example of this impediment, corruption increases transaction costs associated with doing business by increasing the uncertainty of the return on an investment.[28] Heightened uncertainty reduces both domestic and foreign investors' desire to invest.[29] Corruption causes instability that frequently reduces economic growth.[30] The

22. Wolf, *supra* note 20, at 3 (noting that "[a]n estimated $8.4 trillion was lost in developing regions due to illicit financial flows between 2000 and 2009, which was ten times more than those regions received in foreign aid, and roughly the annual GDP of China in 2012.").

23. MEASURING OECD RESPONSES, *supra* note 18, at 73.

24. OCED, STATE-OWNED ENTERPRISES AND CORRUPTION 20 (2018), https://read.oecd-ilibrary.org/governance/state-owned-enterprises-and-corruption_9789264303058-en#page21.

25. *See* Hamid Davoodi & Vito Tanzi, *Roads to Nowhere: How Corruption in Public Investment Hurts Growth*, INT'L MONETARY FUND 6 (Mar. 1998), http://www.imf.org/external/pubs/ft/issues12/index.htm.

26. *The Rationale for Fighting Corruption*, *supra* note 19, at 2–3; *see also* Wolf, *supra* note 20, at 4, 12 ("[C]orruption is an enormous obstacle to the realization of all human rights — civil, political, economic, social, and cultural, as well as the right to development.").

27. *See Combatting Corruption*, *supra* note 2 (contending that corruption impedes investment and undermines the social contract with government).

28. *See id.* (describing the costliness of corruption in international financial flows); *see also The Rationale for Fighting Corruption*, *supra* note 19, at 2.

29. *Combatting Corruption*, *supra* note 2 ("Corruption impedes investment, with consequent effects on growth and jobs.").

30. JUNE S. BEITTEL ET AL., CONG. RESEARCH SERV., R45733, COMBATTING CORRUPTION IN LATIN AMERICA: CONGRESSIONAL CONSIDERATIONS 15–16 (2019), https://crsreports.congress.gov/product/pdf/R/R45733 (stating scholars report that

instability brought about by this uncertainty is particularly harmful for developing countries where other forces of economic uncertainty have already dampened some investors' willingness to invest in a particular region.[31] Funds lost to corruption frequently detract from other societal efforts, such as reducing crime. [32] For example, police officers may refuse to perform routine services without bribes.[33] Bribery may impute bias to public works when the government officials improperly select the winning bidder.[34] Corruption may also affect institutions that are intended to serve the public.[35] Without addressing each type of corruption, meaningful change cannot occur.[36]

Corruption's effects are ascertainable on a macroeconomic level. Corruption can reduce the efficacy of government initiatives, result in heightened levels of terrorism, and reduce or render ineffective the integrity of nascent democracies.[37] Corruption may also reduce trade flows into developing nations, which may in turn negatively affect their economic growth.[38] Lastly, government corruption frequently crosses party lines: as one domestic regime loses power in a nation, the regime is often replaced by a new government that will likewise succumb to corruption.[39]

The most vulnerable victims of corruption are those most likely to suffer

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corruption affects developing countries' ability to obtain loans, lowers economic competitiveness, reduces GDP, and encourages migration).

31. *The Rationale for Fighting Corruption*, *supra* note 19, at 2.

32. BEITTEL ET AL., *supra* note 30, at 15.

33. *Combating Corruption*, *supra* note 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. Phillippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 192 (2005); *see* Dileep Nair, Under-Secretary-General for Internal Oversight Services, Secretary-General's Message to the Third Global Forum on Fighting Corruption and Safeguarding Integrity (May 29, 2003), www.un.org/sg/en/content/sg/statement/2003-05-29/secretary-generals-message-third-global-forum-fighting-corruption (emphasizing the broad negative consequences of corruption and the United Nations' role in addressing these externalities).

38. *See* Bert Denolf, *Impact of Corruption on Foreign Direct Investment*, 9 J. WORLD INV. & TRADE 249, 249, 253–55, 261–62, 264, 269, 271 (2008) (identifying the levels and nature of corruption as operative variables when predicting the negative effects of corruption of foreign direct investment).

39. Susan Rose-Ackerman, *Establishing the Rule of Law*, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 182, 185 (Robert Rotberg ed., Princeton University Press 2004) (illustrating how the consolidated systems of power are abused by replacement governments in a similar manner to how the incumbent government abused those systems).

its effects.[40] Empirical studies have found that in Paraguay, the poor lose on average 12.6 percent of their income to bribes, while high-income families lose 6.4 percent.[41] Similarly, in Sierra Leone, the poor lose on average thirteen percent of their income to bribes, while high-income families lose 3.8 percent.[42] Likewise, the African Union has found that twenty-five percent of the continent's GDP is lost to corruption annually. [43]

While poor nations are most affected by corruption, wealthier countries, where the pecuniary ramifications are less severe, are also affected as the public loses faith in its leaders and government institutions lose legitimacy.[44] Former U.S. Attorney Patrick Fitzgerald has stated that America's corruption victims are "both those who are shaken down for bribes and kickbacks, and the members of the general public, who pay for corruption through inflated costs and loss of faith in government."[45]

Corruption, while not specific to any particular nation, often affects developing nations. According to the U.S. Government Accountability Office ("GAO"), these nations share certain "fundamental challenges" that foster corruption.[46] These challenges include "low civil service salaries, a lack of transparency and accountability in government operations, ineffective legal frameworks and law enforcement, weak judicial systems, and tolerant public attitudes."[47] A number of recent high-profile scandals spanning numerous developing countries have shown that action to address corruption must be taken now.[48]

These nations' inability to adequately address corruption leads to a

40. BEITTEL ET AL., *supra* note 30, at 15.

41. *Combating Corruption*, *supra* note 2.

42. *Id.*

43. Karen Alter & Juliet Sorensen, *Let Nations, Not the World, Prosecute Corruption*, U.S. NEWS & WORLD REP. (Apr. 30, 2014), https://www.usnews.com /opinion/articles/2014/04/30/dont-add-corruption-to-the-international-criminal-courts-mandate.

44. *See id.* (detailing corruption leads to inflated costs in wealthier nations such as the United States).

45. *Id.*

46. *See* U.S. GENERAL ACCOUNTING OFF., GAO-04-506, FOREIGN ASSISTANCE: U.S. ANTICORRUPTION PROGRAMS IN SUB-SAHARAN AFRICAN WILL REQUIRE TIME AND COMMITMENT (Apr. 2004), https://www.gao.gov/assets/250/242162.pdf (indicating pervasive corruption in sub-Saharan Africa). In July 2004, the General Accounting Office changed its name to the Government Accountability Office.

47. *Id.*

48. *See* JUNE S. BEITTEL, CONG. RESEARCH SERV., IF10802, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, (Jan. 9, 2018) [hereinafter BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA], https://crsreports.congress.gov/product/pdf/ IF/IF10802.

reduction in foreign investment.[49] This occurs because politicians overseeing public works bidding often expect a payout or other remuneration to award a project to a particular bidder.[50] The perception of public corruption, in turn, reduces outside direct investment.[51]

As one example, Latin America has been particularly befallen by corruption, which has stifled economic growth in the region.[52] The 2016 CPI reported that "nearly a third of all Latin American respondents said they had paid a bribe for a public service such as health care or education in the past twelve months."[53] Corruption has deepened Latin American inequality and weakened the region's ability to provide public services.[54] In Latin American nations where corruption runs rampant, economic performance has failed to keep pace with foreign direct investment ("FDI").[55] For example, El Salvador's low FDI flows have been attributed, in part, to the nation's high levels of corruption.[56]

Similarly, in Mexico, corruption has been estimated to cost the country up to five percent of its gross domestic production annually.[57] The name of the incumbent Institutional Revolutionary Party has become tantamount with corruption.[58] Moreover, no fewer than eight of Mexico's state governors have come under investigation for corruption.[59] Mexican officials are also thought to have played a role in the 2014 disappearance of forty-three students who went missing in Guerrero.[60]

By contrast, Brazil's comparatively higher FDI flows have been

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49. *See* BEITTEL ET AL., *supra* note 30, at 15 (noting that World Economic Forum has found a nation's inability to address corruption serves as a "barrier to investment").

50. *See id.* at 2, 13, 16 (detailing corrupt ways in which politicians distort the public-works bidding process in exchange for money or political favors).

51. *See id.* at 16 (attributing Chile's success in achieving growth and foreign investment to the nation's low level of perceived corruption).

52. BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48 (highlighting the growing awareness of corruption in Latin America's public services that is interfering with economic growth "through lost productivity and skewed incentives").

53. *Id.*

54. *Id.*

55. BEITTEL ET AL., *supra* note 30, at 15.

56. *Id.*; *see also* Klaus Schwab, *Global Competitiveness Report 2018*, THE WORLD ECON. FORUM 209 (Oct. 16, 2018), http://www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf.

57. BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48.

58. *Id.* at 13 ("In Mexico, corruption investigations of 20 former state governors, most from the PRI, diminished the party's legacy.").

59. *Id.*

60. *Id.*

attributed to its use of the judiciary to staunchly prosecute corruption.[61] By way of further example, Chile has attracted high levels of FDI, which may be partially attributed to the perception that it provides a non-corrupt business climate.[62] When corruption scandals took place in 2015 and 2017, the country worked quickly to avoid damage to this reputation.[63]

The private sector, which is often reactive to market forces, has also been ineffective in reducing corruption.[64] The private sector can play a key role in reducing corruption by "demanding clean, non-corrupt governance and can serve as [a] strong advocate[] for laws to prohibit bribery and extortion to end the distorted impact of corruption on competition."[65] Indeed, the strength of the business community to both positively and negatively affect corruption is already evident. In some instances, private sector heavyweights have promoted anti-bribery legislation in Latin America.[66] For example, in Mexico, COPARMEX — a business association — has advocated for full implementation of the National Anti-Corruption System.[67] One of the most significant developments of this system would be the creation of an independent prosecutor's office.[68] Business leaders in other nations, such as Honduras and Guatemala, by contrast, have taken steps to reduce the efficacy of anti-corruption controls.[69]

### *C. Human Rights and Corruption*

Corruption is frequently linked to human rights infractions because of its effect on the economic and quality of life metrics for the persons affected. Corruption can sharply reduce the quality of life and overall wellbeing of individuals residing in both developed and developing nations.[70] Research has linked higher rates of corruption with poorer performance on public health indicators, such as infant mortality and immunization rates.[71] The consequences of corruption include lower life expectancy rates, poorer

61. BEITTEL ET AL., *supra* note 30, at 15.

62. *Id.* at 16.

63. *Id.*

64. *Id.* at 15.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (referring to examples of corruption in Chile, Argentina, Brazil, and Colombia).

71. Maureen Lewis, *Governance and Corruption in Public Health Care Systems*, CTR. FOR GLOBAL DEV. (Jan. 2006), http://www1.worldbank.org/publicsector/anticorrupt/Corruption%20WP_78.pdf.

nutrition, and reduced access to education and healthcare facilities for both adults and children.[72] Corruption also obstructs access to public amenities and reduces the efficacy of local initiatives aimed at reducing poverty and improving national wellbeing.[73] In some cases, impoverished individuals may be excluded from using public amenities altogether.[74]

### *D. Corruption as an International Legal Crime*

Due to the adverse human rights impacts and inefficiencies of prosecuting corruption domestically, corruption is often considered an international crime.[75]

By reducing the quality of life for already impoverished populations, corruption becomes a causative factor in human rights violations, leading some scholars to believe it should be classified as an international legal crime.[76] As one scholar has noted, "corruption is directly connected to a violation of human rights when the corrupt act is delivery used as a means to violate the right . . . [f]or example, when an individual must bribe a doctor in order to obtain medical treatment, or bribe a teacher in order to be allowed to attend a class, his right of access to health and education has been infringed by corruption."[77] Providing a less direct example, if a corrupt government allows environmental contamination or degradation, it will result in toxic waste or cause harmful environmental conditions.[78] Though not every incident of corruption causes a human rights violation, many forms of corruption materially reduce the quality of life for impoverished populations. Under this approach, corruption can constitute an international legal crime when human dignities are harmed.[79]

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72. Ben Bloom, Comment, *Criminalizing Kleptocracy? The ICC As a Viable Tool in the Fight Against Grand Corruption*, 29 AM. U. INT'L L. REV. 627, 655–56 (2015) (outlining consequences of grand corruption).

73. *Id.*

74. *The Rationale for Fighting Corruption*, *supra* note 19, at 3 (explaining that the poor could be "excluded from basic services like health care or education" because they cannot afford to pay for bribes requested from a corrupt government).

75. *See generally* Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT'L CRIM. JUSTICE 466 (2006) (noting the criminalization of transnational corrupt practices is now an international offense).

76. *See* Julio Bacio-Terracino, *Linking Corruption and Human Rights*, 104 AM. SOC'Y INT'L L. PROC. 243, 243 (2010); *see also* Joel M. Ngugi, *Making the Link Between Corruption and Human Rights: Promises and Perils*, 104 AM. SOC'Y INT'L L. PROC. 246, 246, 249–50 (2010).

77. Bacio-Terracino, *supra* note 76, at 243–44.

78. *See id.*

79. *See id.* at 243.

As one example, the United States has defined "international crime" as "criminal conduct that transcends national borders and threatens U.S. interests in three broad, interrelated categories: threats to Americans and their communities, threats to American businesses and financial institutions, and threats to global security and stability."[80] U.S. GAO guidance has stated that the following actions constitute international crimes:

> corruption; terrorism; drug trafficking; illegal immigration and alien smuggling; trafficking in women and children; environmental crimes (including flora and fauna trafficking); sanctions violations; illicit technology transfers and smuggling of materials for weapons of mass destruction; arms trafficking; trafficking in precious gems; piracy; non-drug contraband smuggling; intellectual property rights violations; foreign economic espionage; foreign corrupt business practices; counterfeiting; financial fraud (including advance fee scams and credit card fraud); high-tech crime; and money laundering.[81]

Multiple international agreements address the issue of corruption and provide further evidence that corruption is an international legal crime and is treated as such. For example, the United Nations Convention Against Corruption ("UNCAC") provides in Article 36 that signatory countries must "ensure the existence of a body or bodies of personnel specialized in combating corruption through law enforcement."[82] Likewise, the Council of Europe's Criminal Law Convention states in Article 20 that "[e]ach party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption."[83] Further, the Council of Europe Committee of Ministers Resolution 97 (24), in the Twenty Guiding Principles For the Fight Against Corruption, in Principles 3 and 7, provides for "the establishment of a specialised, independent, well-trained and adequately resourced body to fight corruption."[84]

However, not all scholars agree that corruption should be classified as a crime against humanity. First, according to some scholars, it is unclear whether Article 7(i)(k) of the Rome Statute "is broad enough to allow

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80. U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-629, INTERNATIONAL CRIME CONTROL: SUSTAINED EXECUTIVE-LEVEL COORDINATION OF FEDERAL RESPONSE NEEDED 16 (2001).

81. *Id.*

82. United Nations Convention Against Corruption, art. 36, Oct. 31, 2003, G.A. Res. 58/4, 2349 U.N.T.S. 161.

83. Council of Europe Criminal Law Convention on Corruption, art. 20, Jan. 27, 1999, https://rm.coe.int/168007f3f5.

84. Council of Europe Committee of Ministers Resolution 97 (24), Twenty Guiding Principles for the Fight Against Corruption, 3, 7, Nov. 6, 1997, https://polis.osce.org/node/4681.

inclusion of grand corruption as a prosecutable crime against humanity."[85] If grand corruption does not fall within the Rome Statute, the statute will need to be amended, which requires that two-thirds of the Member States' votes.[86] Corrupt governments may not be willing to support amending the Rome Statute.[87] Further, even if Article 7 were amended, not all nations, but only those nations that voted for the change, would be subject to its enforcement.[88] Consequently, the nations most marred by corruption may also be the least likely to be bound by any amendment.[89]

Under the second approach, the Elements of Crimes could be amended to enable grand corruption to be defined as a crime against humanity, which is also likely to be contested in the Assembly of States parties and would require a two-thirds majority vote.[90] Another approach would be to petition the Office of the Prosecutor to "utilize prosecutorial discretion to interpret Article 7(k) to include grand corruption . . . ."[91] However, some scholars have suggested that this approach could face backlash in the ICC's judicial chambers.[92]

### *E. National Legislation Presents Stand-Alone Efforts to Reduce Corruption*

National legislation has presented stand-alone efforts to reduce corruption. For example, the U.K. passed the 2010 Bribery Act, which

85. Steven Groves et al., *Why the U.S. Should Oppose the Creation of an International Anti-Corruption Court*, THE HERITAGE FOUND. (Oct. 1, 2014), https://www.heritage.org/global-politics/report/why-the-us-should-oppose-the-creation-international-anti-corruption-court.

86. *Id.*

87. *See id.*

88. *See id.*; *see also* Rome Statute of the International Criminal Court, art. 7, 121, 121(5), July 17, 1998 (corrected 2002), 2187 U.N.T.S. 38544 ("Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nations or on its territory.").

89. Groves et al., *supra* note 85.

90. *Id.*; *see also* Rome Statute of the International Criminal Court, art. 9(1)–(2)(c), July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) ("Elements of Crimes shall assist the Court in the interpretation and application of articles 6,7, and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties."); Rome Statute of the International Criminal Court, art. 9(1)–(2)(c), July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) ("Amendments to the Elements of Crimes may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; (c) The Prosecutor. Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.").

91. Groves et al., *supra* note 85; *see also* Bloom, *supra* note 72, at 667–71.

92. Groves et al., *supra* note 85.

took effect in July 2011.[93] The U.K. Anti-Bribery Act "criminalizes both commercial bribery and bribery of foreign public officials for all companies doing business in the United Kingdom and for all U.K. citizens and companies doing business abroad."[94] The U.K. Serious Fraud Office has also recently strengthened its stance on corruption, stating that the self-reporting of corruption is not sufficient in itself to prevent prosecution of such acts.[95]

Similarly, Mexico ratified the extraterritorial Federal Procurement Anti-corruption Law, which imposes sanctions "against both foreign and Mexican persons for corrupt practices relating to public contracts with both the Mexican federal government and foreign governments as well, including bribery occurring through a third party."[96] Mexico's law is notable because it specifically criminalizes the act of offering a bribe, irrespective of whether such a bribe was actually paid.[97]

India has also passed anti-corruption laws, including the Prevention of Corruption Act (1988) and the Prevention of Money-Laundering Act (2002).[98] The 2011 Lokpal Bill (Prevention of Bribery of Foreign Public Officials and Officials of Public international Organization Bill), which remains stalled in India's Parliament, is another example of the country's efforts to reduce corruption.[99] India's anti-corruption laws criminalize "both active and passive bribery" of foreign public leaders.[100] Similarly, Indonesia ratified legislation to eradicate corruption in 2001 and has recently proposed new anti-corruption laws that would prosecute acts of bribery by foreign public officials and private sector corruption.[101]

As described in further detail below, Brazil has also increased its efforts to prosecute corruption. In addition to the existing legal framework described above, Brazil's current draft law, Responsibility of Legal Persons

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93. *See* Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, 42 INT'L L. NEWS 11, 12 (2013) (stating that the Bribery Act is the most notable stand-alone legislation to combat corruption).

94. *See id.* at 12 (highlighting that the Bribery Act is broad in scope and applies extraterritorially).

95. *See id.* (altering key provisions related to self-disclosure because it is not a guarantee of non-prosecution).

96. *Id.* (detailing that Mexico's law applies extraterritorially as well).

97. *Id.*

98. *Id.* (explaining that India had not taken any measures to address the bribery of foreign public officials until 2011).

99. *Id.*

100. *Id.*

101. *Id.*

for Acts of Corruption (Bill 6,826/2010), "would establish the direct liability of legal entities for acts for corruption committed by their directors, officers, employees, and agents"[102] and "would also provide for debarment from public contracting and fines of up to thirty percent of a company's income."[103] Under current law, persons engaging in corruption may be jailed for up to thirty years.[104]

### *F. Corruption in Latin America — The Case of Lavo Jato*

The Odebrecht scandal, known as *Lavo Jato*, which has touched multiple Latin American nations, is perhaps one of the most high-profile recent portrayals of public corruption.[105] In 2017, Odebrecht, a Brazilian construction company, admitted that it had paid up to $800 million in bribes over the prior two decades to secure public contracts throughout Latin America valued at more than $3.3 billion.[106] Public officials in a number of Latin American nations, including Mexico, Colombia, and Panama, admitted accepting bribes.[107] Ecuador's Vice President Jorge Glas was convicted of accepting over $13 million in bribes from the company.[108] Further Peru's President Pablo Kuczynski was nearly impeached after he was accused of accepting bribes from Odebrecht.[109]

In the wake of the *Lavo Jato* scandal, significant changes took place. Former Brazilian President Michael Temer was arrested after allegations surfaced that he had accepted $2 million in bribes from Odebrecht and had engaged in money laundering after leaving office.[110] A number of other senior Brazilian officials and business executives, including former President Luiz Inácio Lul de Silva and Aécio Neves, were also arrested on significant charges for accepting bribes in exchange for awarding certain public contracts.[111] This systemic corruption was identified and

102. *Id.*

103. *Id.*

104. *See id.* (explaining that various existing provisions criminalize public officials offering and accepting bribes).

105. BEITTEL ET AL., *supra* note 30, at 9–10 (stating that Brazil's multinational construction firm Odebrecht was involved in a landmark plea agreement and admitted to paying millions in bribes to politicians and office holders throughout Latin America).

106. *Id.* at 9; *see also* BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48.

107. BEITTEL, SPOTLIGHT ON PUBLIC CORRUPTION IN LATIN AMERICA, *supra* note 48.

108. *Id.*

109. *Id.*

110. BEITTEL ET AL., *supra* note 30, at 9–10 (noting that the President was protected from investigation during his tenure).

111. *Id.* at 10.

investigated through numerous cooperative investigations.[112] The investigations uncovered a number of other scandals that resulted in "the charging of more than 900 individuals" and allowed prosecutors to "secure[] more than 200 convictions for crimes including corruption, money laundering, and abuse of the financial system."[113] Due to a large case backlog, many of the persons implicated in these scandals have not been convicted.[114] Some of the anti-corruption proposals were ultimately incorporated into Brazil's draft laws that were subsequently presented before the nation's Congress in early 2019.[115]

A number of legal and institutional factors have propelled these reforms.[116] First, the Brazilian attorney general (*Ministério Público Federal*, MPF) has significant autonomy granted by the Brazilian constitution.[117] This independence has allowed the attorney general to pursue cases against high-profile leaders without fear of retaliation.[118] The attorney general may also work with the Brazilian legal scheme, as exemplified by a law entering into effect in 2013 that allows attorney to reduce penalty for cooperative defendants.[119] During the *Lavo Jato* investigation, Brazilian prosecutors granted at least 218 plea agreements as part of their investigations.[120] Brazil has further benefitted from its ability to use the resources provided by the United States and other nations.[121] Notably, during the *Lavo Jato* investigation, prosecutors "issued 269 formal requests for legal assistance to 45 countries."[122] Brazil has also received assistance from information cooperation and dialogue with the U.S. Department of Justice and analogous offices of other nations; such

112. *Id.* at 23.
113. *Id.* at 22–23.
114. *Id.* at 23.
115. *Id.* at 9–10.
116. *Id.* at 23.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* (citing Mutual Legal Assistance, U.S. Braz., Oct. 14, 1997, S. TREATY DOC. NO. 105-42 (1998) (providing for bilateral cooperation in investigations between the United States and Brazil because "[t]he bilateral treaty empowers both countries to request assistance from one another, including taking the testimony or statements of persons; providing documents, records, and items; locating or identifying persons or items; serving documents; transferring persons in custody for testimony or other purposes; executing requests for searches or seizures; assisting in proceedings relating to immobilization and forfeiture of assets, restitution, and collection of fines; and any other form of assistance not prohibited by law.").

cooperation has allowed for improved sharing of evidence and information.[123] This increased coordination between the United States and Brazil has allowed for coordinated prosecutions of large corporations that violated the U.S. Foreign Corrupt Practices Act ("FCPA")[124] and Brazilian anti-bribery laws.[125] These coordinated prosecutions have resulted in $1.9 billion and $4.4 million in payments to the United States and Brazil respectively.[126]

## III. NATIONAL PROSECUTIONS, FAILED CASES

Reports by the Inter-American Development Bank ("IDB"), finding earlier attempts to reduce corruption to be "uneven" in scope and efficacy, have suggested that an "integrated approach" is needed to reduce pervasive corruption.[127] The IDB acknowledged the importance of measures of corruption developed by key ratings agencies, including Standard & Poor's, Fitch, and Moody's.[128] If such ratings are unfavorable, a recipient country is less likely to attract investment.[129]

The IDB report suggested that the most meaningful efforts at reducing corruption required action on behalf of private and public sector initiatives, as well as community efforts.[130] The report concluded that "successfully addressing corruption will require the concerted attention of both governments and businesses, as well as the use of the latest advanced technologies to capture, analyze, and share data to prevent, detect, and deter corrupt behavior."[131]

U.S. government agencies have found comparable results. For example, U.S. GAO has concluded that meaningful reduction in corruption must come from multipronged initiatives that include backing from both government officials, the private sector, and members of the public.[132] Other factors reducing corruption include promoting public "access to

123. BEITTEL ET AL., *supra* note 30, at 24.

124. 15 U.S.C. § 78dd-1 (1998).

125. BEITTEL ET AL., *supra* note 30, at 23–24.

126. *Id.* at 24 (noting such companies found in violation include Braskem, Embraer, Keppel Offshore and Marine, Odebrecht, Petrobras, Rolls Royce, and SMB Offshore).

127. *Id*. at 15–16.

128. *Id.* at 16.

129. *Id.*

130. *See Combating Corruption*, *supra* note 2 (finding that governments and businesses must collaborate and use advancing technologies to fight corruption).

131. *Id.*

132. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-506, FOREIGN ASSISTANCE: U.S. ANTICORRUPTION PROGRAMS IN SUB-SAHARAN AFRICAN WILL REQUIRE TIME AND COMMITMENT (Apr. 2014), https://www.gao.gov/assets/250/242162.pdf.

government information."[133] Like the IDB, U.S. GAO concluded that a long-term approach must be considered, noting that "because corruption cannot be eradicated quickly and simply, anti-corruption efforts require long-term commitment to gain public confidence."[134]

### *A. National Anti-Corruption Efforts Have Largely Been Inadequate to Reduce Corruption.*

Countries have responded with different legislative initiatives as well as the development of national courts in order to prosecute persons engaged in corruption related to national projects.

For example, in Bangladesh, institutionalized corruption was deemed to have reached "endemic proportions" in the years prior to 2007.[135] There, Bangladesh's anti-corruption efforts, among a variety of legislative initiatives, including versions of the nation's penal code dating to 1860, as well as the 1947 Prevention of Corruption Act ("PCA") and the 2004 Anti-Corruption Act.[136] The PCA created the Anti-Corruption Commission ("ACC"), which was charged with the sole responsibility for reducing corruption within the nation through investigations and prosecutions.[137] Bangladesh is also a member of several international anti-corruption treaties, including UNCAC. The ACC is directed by three commissioners and a chairman who is appointed by the current President of Bangladesh.[138] In order to reduce bias by the Commission, Commission members are not able to hold "any profitable office in the service of the Republic" upon leaving the post.[139] Nevertheless, despite these efforts, corruption and fraudulent conduct proliferated throughout the nation, particularly in the form of bribery and civil servant corruption.[140] Further, prosecutions in Bangladesh have largely failed to make a tangible impact on reducing national corruption.[141]

Prosecutions in Kenya have yielded similar results.[142] Like Bangladesh,

133. *Id.*

134. *Id.*

135. *See* U.N. ESCOR, U.N. Dev. Programme, Rep. of Anti-Corruption Assessment Mission: Dhaka Bangladesh, at 7 (March 2–15, 2008) (stating that corruption in Bangladesh has increased in the years leading up to January 11, 2007).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 15.

140. *See id.* at 16–17.

141. *Id.* at 19.

142. *See Frequently Asked Questions About the Kenya Anti-Corruption Commission*, KENYA ANTI-CORRUPTION COMMISSION 8–9, https://www.eacc.go.ke/wp-

Kenya has established several anti-corruption initiatives, including the Ethics and Anti-Corruption Commission ("EACC"), which replaced the Kenya Anti-Corruption Commission ("KACC") in 2011.[143] The EACC has primary responsibility for investigating and prosecuting corruption in Kenya.[144] The EACC is comprised of "a Chairperson and four other members appointed according to the provisions of the Constitution" and the Ethics and Anti-Corruption Commission Act of 2011.[145] In addition to investigation and prosecution, the EACC also engages in public outreach and educational efforts to combat corruption.[146] Despite these efforts, as in Bangladesh, Kenya continues to experience widespread corruption, particularly in its public procurement and government sectors, with bribery of government officials remaining widespread.[147]

Further, a regional approach to combatting corruption has not proven to successfully address fraudulent conduct across a regional bloc or group of countries working together to combat corruption. For instance, during the African Union Convention on Preventing and Combating Corruption in 2004, some African nations joined together to reduce corruption across the region.[148] Despite the argument that corruption may manifest itself differently due to regional variations in governance structure and economic metrics, regional efforts at quashing corruption have largely proven ineffective due to the often inapposite national interests of each individual nation.[149] Nations often have a vested interest in asset recovery and regional investment, which reduces the efficacy of regional anti-corruption commissions or courts.[150] Moreover, those nations that are most plagued

content/uploads/2018/08/KACC-FAQ-A5-Book.pdf (last visited Apr. 25, 2020).

143. *About Us*, ETHICS & ANTI-CORRUPTION COMMISSION, http://www.eacc.go.ke/about-us/ (last visited Apr. 25, 2020).

144. *Id.*

145. *Id.*

146. *See id.*

147. *See* Michel Arseneault, *Anti-corruption Officials Suspended, Casting Shadowing on Kenyan Transparency*, RFI (Apr. 24, 2015), http://www.english.rfi.fr/africa/20150424-anti-corruption-officials-suspended-casting-shadow-kenyan-transparency (finding that the recent political suspensions and investigations are a major setback in efforts to end political corruption and other anti-graft efforts).

148. *See* Melissa Khemani, *Corruption and the Violation of Human Rights: The Case for Bringing the African Union Convention on Preventing and Combating Corruption within the Jurisdiction of the African Court and Human and Peoples' Rights*, 16 AFR. Y.B. INT'L L. 213, 214 (2008) (noting the "crippling effects" of corruption prompted Member States to adopt the Convention on Preventing and Combating Corruption in 2003).

149. *See id.* at 214, 220.

150. *See id.* at 222.

by corruption at the level of their government and public officials may not possess the political stability to develop and assist in overseeing an effective anti-corruption panel within the region.[151]

### *B. MDB Sanctions Boards Are Limited in Prosecuting Corruption*

National prosecutions of international corruption cases have failed to make a noticeable impact on widespread corruption.[152] Under the current framework, each MDB carries its own sanctioning process. Sanctions board decisions of each body are enforceable as for projects by other MDBs.[153] For instance, an entity that is debarred by the World Bank's Sanctions Board will often be unable, through reciprocity, to obtain a contract from another MDB.[154] The vendors and entities deemed non-responsible entities will be publicly listed and are ineligible to bid on or be awarded World Bank projects.[155] On an MDB project, fraudulent conduct may occur during project design, procurement, implementation, or during the project's later management.

Most prominently, the Integrity Vice Presidency ("INT") of the World Bank investigates and reviews possible allegations of corruption, and the World Bank's Sanctions Board issues sanctions.[156] Other MDBs abide by the Sanctions Board decision when selecting analogous bid procurements.[157] Reciprocity agreements — often known as cross-debarment — are standard practice among the World Bank and comparable MDBs.[158] Still, cross-debarment rarely occurs between a national government and MBD or other institution.[159] As a result, an entity that has been found corrupt and has been debarred by the World Bank or other MDB may be eligible to obtain procurement for a project from a national

151. *See id.*

152. *See* Alina Mungiu-Pippidi & Niklas Kossow, *Rethinking the Way We Do Anti-Corruption*, NATO REV. MAG., https://www.nato.int/docu/review/2016/also-in-2016/anticorruption-corruption-laws-regulation-control-anticorrp-budget-index/en/index.htm (last visited Feb. 26, 2020) (testing the effectiveness of various anti-corruption strategies using quantitative methods).

153. *See* INFORMATION NOTE, *supra* note 6, at 9.

154. *See id.* at 9–10.

155. *See id.* at 5.

156. *See id.* at 4 (defining the role of the "INT").

157. *See id.* at 9 (implementing "cross-debarments" between the sanctions board and MDBs).

158. *See also id.*

159. *See* Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 GEO. WASH. INT'L L. REV. 219, 221 (2013) (stating cross-debarment between governments and other institutions is not yet common).

agency elsewhere.[160]

The World Bank has introduced several additional concrete efforts to halt corruption, including the "introduction of a confidential hotline, tightening of procurement guidelines, intensive audits of projects, and support for improving procurement systems in client countries."[161] The World Bank also offers support to those countries requesting assistance in investigating potential acts of corruption.[162]

In addition to debarment, the World Bank and other MDBs have other avenues to recover assets lost to corruption — for example, the United Nations' and World Bank's Stolen Asset Recovery ("StAR") Initiative.[163] The StAR Initiative, part of the Bank's Governance and Anti-Corruption Strategy, is a fairly recent effort to reclaim assets that had been allocated for projects in developing nations.[164] Notably, the StAR initiative has been able to take effect due to the implementation of the UN Convention Against Corruption ("UNCAC"), which took effect in December 2005 and will be discussed in greater detail later in this Article.[165]

## IV. EXISTING INTERNATIONAL TRIBUNALS ARE NOT SUFFICIENT TO PROSECUTE

### *A. Corruption: Limitations of the ICC*

The limitations associated with standalone international courts, as was seen by the experience of the International Criminal Court ("ICC"), International Criminal Tribunal for Rwanda[166] ("ICTR"), and International Criminal Tribunal for the former Yugoslavia[167] ("ICTY"), suggest that a new judicial approach must be installed in order to successfully address corruption. Because the ICTR and ICTY were specially created to prosecute particularly heinous war crimes, this Article will only explore the limitations of the ICC.

Founded in 2002 by the Rome Statute, the ICC is a special court that

160. *See id.*

161. JEFF HUTHER & ANSWAR SHAR, THE WORLD BANK, ANTI-CORRUPTION POLICIES AND PROGRAMS: A FRAMEWORK FOR EVALUATION (2000).

162. *Id.*

163. THE WORLD BANK, STOLEN ASSET RECOVERY (STAR) INITIATIVE: CHALLENGES, OPPORTUNITIES, AND ACTION PLAN (2007).

164. *Id.*

165. *Id.*

166. *See Int'l Residual Mechanism for Criminal Tribunals for Rwanda*, UNITED NATIONS, http://unictr.irmct.org/ (last visited Apr. 25, 2020).

167. *See Int'l Crim Tribunals for the Former Yugoslavia*, UNITED NATIONS, http://www.icty.org/ (last visited Apr. 25, 2020).

investigates and prosecutes individuals charged "with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression."[168] While the ICC has launched investigations and prosecutions, leading to the public indictment of over forty persons for grave crimes, the ICC has been criticized as slow and inefficient.[169]

Scholars have also suggested that there are three major concerns associated with the ICC's current mandate. First, the ICC has been condemned for perpetuating imperialism through its focus on prosecuting Africans.[170] Second, the ICC has been criticized for its failure to adhere to the precedent of other tribunals.[171] Third, the ICC and other international tribunals have been criticized for their lack of information-sharing across tribunals.[172] Each of these criticisms will be discussed in turn.

The experience of the ICC suggests that, while effective in reducing corruption in some capacity, international courts are often slow and are not effective in reducing systemic corruption. Notably, the ICC has been criticized for perpetuating imperialism by subjugating and marginalizing Sub-Saharan African nations and has been slow and ineffective in carrying out prosecutions.[173] Some critics of the ICC have alleged that the ICC has placed a heightened focus upon prosecuting African nations that have

168. *About the ICC*, INT'L CRIM. CT., UNITED NATIONS, https://www.icc-cpi.int/about (last visited Apr. 25, 2020).

169. *See* Anthony Wang, *On the Failed Authority of the International Criminal Court*, INT'L POL'Y DIG. (June 15, 2018), https://intpolicydigest.org/2018/06/15/on-the-failed-authority-of-the-international-criminal-court/ (noting the ICC's "deep institutional bureaucracy" which slows its pace undermines public confidence in the ability to deter future wrongdoers). *See generally Home*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/Pages/defendants-wip.aspx (last visited Feb. 26, 2020).

170. *See* Jessica Hatcher-Moore, *Is the World's Highest Court Fit For Purpose?*, THE GUARDIAN (Apr. 5, 2017), https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose.

171. *See* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 20 (2011) (highlighting the importance of adhering to precedent in cases having the same legal issues).

172. OPEN SOC'Y JUSTICE INITIATIVE, BRIEFING PAPER: ESTABLISHING PERFORMANCE INDICATORS FOR THE ICC 8 (2015), https://www.justiceinitiative.org/uploads/b14d7fe9-0548-4b5e-9ebe-f97a6cf119ed/briefing-icc-perforamnce-indicators-20151208.pdf ("The ICC does not have an institutional tradition of sharing information across organs.").

173. *See, e.g.*, Ugamanim Bassey Obo & Dickson Ekpe*, Africa and the International Criminal Court: A Case of Imperialism By Another Name*, 3 INT'L J. DEV. & SUSTAINABILITY 2025, 2034 (2014), https://isdsnet.com/ijds-v3n10-6.pdf (contending that the prosecutorial inertia the ICC exerts when crimes are committed by dominant countries undermines justice for the larger pool of victims).

previously been harmed by Colonialism and other Western "assistance."[174]

Furthermore, the ICC has been criticized for its views toward stare decisis and precedent.[175] Although ICC decisions acknowledge the findings of other international courts, the ICC specifically provides that the decisions of the tribunals are not binding upon its decisions. Particularly, in *Prosecutor v. Lubanga Dujilo*, the tribunal stated that "decisions of other international courts and tribunals are not part of the directly applicable law . . . ."[176] Although the ICC has reviewed the opinions of other courts, the lack of an influential body of law reduces the efficacy and legitimacy of the Court.[177] In addition, the ICC and other international tribunals have been criticized for the lack of information-sharing processes across tribunals. This lack of transparency has reduced the efficiency and impartiality of these tribunals.

Despite the foregoing limitations, one approach that has been proposed to reduce corruption is expanding the ICC's mandate so that it can prosecute acts of corruption.[178] However, some critics have suggested that the ICC lacks the experience and resources to prosecute corruption.[179] The ICC currently lacks investigators and lawyers with this expertise.[180] Likewise, domestic legal prosecutors likely will not have the expertise to address corruption in other countries that may have differing customs and cultures. Further, acts of corruption vary widely from each other.[181]

Critics of expanding the ICC's jurisdiction have also argued that, because many of these investigations require undercover efforts and cooperating witnesses, the ICC, which has limited relationship with national law enforcement, would be unable to adequately conduct

174. Mwangi S. Kimenyi, *Can the International Criminal Court Play Fair in Africa?*, BROOKINGS INST. (Oct. 17, 2013), https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/ (suggesting that African countries were pressured to sign the EU treaty that intertwined colonialist interests with those of African countries).

175. Guillaume, *supra* note 171, at 12–13.

176. Prosecutor v. Dujilo, ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Stat., ¶ 603 (Mar. 14, 2012); Aldo Zammit Borda, *Precedent in International Criminal Courts and Tribunals*, 2 CAMBRIDGE J. INT. & COMP. L. 287, 294 (2013).

177. *See* Borda, *supra* note 176, at 294–95 (highlighting a need to turn to external decisions).

178. Alter & Sorensen, *supra* note 43 ("What international criminal law does best is prosecute those most responsible, at the apex of the pyramid, when individual nations are unwilling or unable to do so.").

179. *Id.* (finding the infrastructure insufficient for prosecuting mass atrocities).

180. *Id.* (noting that war crimes require a different set of skills from those of domestic approaches).

181. *Id.* (discussing a range of corruptions requiring specialized expertise).

investigations.[182] For this reason, critics have argued that the ICC would be unlikely to have the resources to investigate and prosecute corruption more effectively than the lawmakers that are working at the national level.[183] Such critics have further suggested that bilateral treaties, particularly those in the investor space, and other efforts to assist nations with additional resources to prosecute corruption within their borders would be more effective than another stand-alone international court.[184] As one example of an ancillary mechanism to fight corruption, certain scholars have proposed that international arbitration could play an increased role in fighting corruption.[185] The investor-state dispute mechanisms play a key role in ensuring that cross-border transactions are not befouled by corruption.[186] Bilateral investment treaties typically provide for international arbitration clauses to protect the investor and recipient state in the event of a dispute, and has imbued transparency into these agreements.[187] Applying similar efforts to agreements at risk for bribery may be a more effective and less burdensome mechanism to reduce corruption.[188] For these reasons, according to critics, the scope of ICC's responsibility should not be expanded to prosecute corruption.

## V. A HYBRID, MIXED PROSECUTION APPROACH TO REDUCING CORRUPTION IS NEEDED TO BUILD UPON EXISTING NATIONAL AND INTERNATIONAL EFFORTS

Due to the apparent shortcomings associated with a limited national approach to anti-corruption, a more integrated cross-border approach must be created. There has already been a number of promising efforts at collaboration to reduce corruption.[189] Despite these promising early efforts,

182. *Id.*

183. *See id.* (reasoning that national level authorities are better equipped to handle witnesses).

184. *See id.*; *see also An Open Letter About Investor-State Dispute Settlement (April 2015*), MCGILL (Apr. 20, 2015), https://www.mcgill.ca/fortier-chair/isds-open-letter (describing value of bilateral investment agreements in promoting transparency and sovereignty). *But see* Leo O'Toole, *Investment Arbitration: A Poor Forum for the International Fight Against Corruption*, YALE J. INT'L L. (Dec. 1, 2016), https://www.yjil.yale.edu/investment-arbitration-a-poor-forum-for-the-international-fight-against-corruption/ (arguing international arbitration a weak mechanism to reduce corruption).

185. *See id.*

186. *Id*.

187. *Id*.

188. *Id*.

189. *See* Hassan, *supra* note 93 (explaining how some countries have amended their anti-corruption laws to expand the scope and extraterritorial application of the laws).

more still must be done.

The United States has signaled its support for increased international collaboration. Evidencing this support, Congress passed the International Anticorruption and Good Governance Act in October 2000, which aims to assist other countries "combat corruption throughout society and to improve transparency and accountability at all levels of government and throughout the private sector."[190] However, the United States did not offer new funding for anti-corruption efforts.[191] Most recently, the United States has signaled it will assist with auditing initiatives to promote transparency. As one example of these efforts, on March 1, 2019, GAO's Center for Audit Excellence announced that it had signed a Memorandum of Understanding with the World Bank in its latest attempt to "strengthen international accountability and promote good governance . . . [and] will include "potential to coordinate on needs assessments, advisory services, training, mentoring, internal controls, and performances audits, among other areas."[192]

As will be described further below, increased transparency and information sharing will be crucial in reducing corruption — evidence suggests corruption is significantly reduced where such acts are visible.[193] Increased information sharing will also reduce duplication of efforts.[194]

In tandem with improved information sharing, sanctions for corruption must be created. As experienced by the Export-Import Bank of the United States ("EXIM Bank"), prior to the creation of the Office of Inspector General ("OIG"), entities and persons will not be deterred from engaging in corrupt acts unless the penalties for such acts are steep.[195] Indeed, persons

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190. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-506, FOREIGN ASSISTANCE; U.S. ANTICORRUPTION PROGRAMS IN SUB-SAHARAN AFRICA WILL REQUIRE TIME AND COMMITMENT (Apr. 2014), https://www.gao.gov/assets/250/242162.pdf.

191. *Id.*

192. Press Release, U.S. Gov't Accountability Off., GAO's Ctr. for Audit Excellence & World Bank Begin New P'ship to Enhance Capacity of Accountability Orgs. (Mar. 1, 2019) (on file with the author).

193. *See* Robert I. Rotberg, *Accomplishing Anticorruption: Propositions and Methods*, 147 DAEDALUS J. AM. ACAD. ARTS & SCI. 12 (2018) (citing Georgia's information-sharing reforms that led to reduced corruption).

194. This approach would *not* include increasing access to information, it would include appropriate safeguards such that rogue governments would not misuse this information.

195. EXPORT-IMPORT BANK OF THE UNITED STATES, OFFICE OF INSPECTOR GENERAL, FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, 2 [hereinafter FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION], https://www.exim.gov/sites/default/files/congressional-resources/budet-justification/FY_2020_EXIM_CBJ_-_Compliant.pdf (stating that pre-OIG enforcement attempts were unsuccessful because the penalties "did not carry significant risk," and "the lack of effective deterrence" served as an

who engage in corruption engage in a cost-benefit analysis and will not decide against such behavior until the risks outweigh the rewards.[196]

In light of the foregoing arguments, a unified anti-corruption sanctioning body must be created.

### *A. Where Prior Anti-Corruption Conventions Have Fallen Short: Weaknesses of the OECD Convention on Bribery*

International conventions and treaties on corruption have presented early first attempts at an international effort to reduce corruption; however, such efforts have not adequately mitigated corruption or its effects. Such early attempts to coordinate anti-corruption laws suggest additional unification is possible.

Most prominently, in 1994 the OECD created the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions ("OECD Anti-Bribery Convention"), which "requires its parties to criminalize the bribery of foreign public officials in international business transactions."[197] The Convention was ratified in 1997 by twenty-nine member countries.[198]

The OECD, founded in 1961 with aims of promoting worldwide economic progress, currently has thirty-nine parties to the OECD Anti-Bribery Convention.[199] Thirty-four of these members are OECD member countries, while five Convention members, including South Africa, Russia, Bulgaria, Brazil, and Argentina, are not currently OECD members.[200] As part of the OECD's efforts to reduce corruption, nations including the United States have taken steps to implement anti-corruption efforts postulated during the OECD Anti-Bribery Convention.[201]

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incentive for other parties to defraud EXIM Bank).

196. *See Combatting Corruption*, *supra* note 2 (explaining that increasing the costs of engaging in corrupt conduct by enhancing accountability and strengthening enforcement mechanisms is key to effective deterrence); *see also* FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 195, at 2 ("An active program of investigating and arresting foreign nationals responsible for fraudulent schemes has been implemented and has generated results.").

197. CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & ENF'T DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 7 (Nov. 14, 2012) [hereinafter A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

198. Hassan, *supra* note 93.

199. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 7.

200. *Id.*

201. *See* DEP'T OF JUSTICE, STEPS TAKEN BY THE UNITED STATES TO IMPLEMENT

The OECD also has a Working Group on bribery, which considers potential avenues to reduce corruption.[202] The Working Group further assists with the implementation and oversight of such anti-bribery efforts.[203] All members of the Anti-Bribery Convention participate in the Bribery Working Group.[204] Colombia has also been invited to join the Working Group.[205]

The Working Group implements recommendations set forth in the Anti-Bribery Convention.[206] The Working Group engages in a quarterly peer review to monitor whether member states are adequately implementing the provisions of the Anti-Bribery Convention.[207] The Working Group also sets forth a peer-review monitoring system that assesses whether a country's domestic laws adequately implement the Convention, whether such laws are effective, and whether a country is adequately conducting enforcement actions when corruption is identified.[208]

However, the OECD Convention has significant limitations, including the fact that it has no jurisdiction over non-signatories or other nations that choose not to accept its jurisdiction.[209] Further, the OECD solely implements the domestic anti-corruption laws of a particular nation, but does not provide for a single body to oversee efforts to prosecute corruption affecting multiple nations concurrently.[210]

### *B. UNCAC Has Failed to Adequately Address Corruption.*

Like the OECD, the U.N. Convention Against Corruption ("UNCAC") has been unable to adequately prosecute acts of corruption. UNCAC was passed by the U.N. General Assembly on October 31, 2003, and took effect on December 14, 2005.[211] Like the OECD Convention, UNCAC requires

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AND ENFORCE THE OECD ANTI-BRIBERY CONVENTION (Feb. 25, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/03/19/2013-02-25-steps-taken-oecd-anti-bribery-convention.pdf (describing enforcement resources and actions by the United States).

202. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 7.

203. *Id.*

204. *Id.*

205. Hassan, *supra* note 93.

206. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 7.

207. *Id.*

208. *Id.*

209. *See* Anna Souza, *The OECD Anti-Bribery Convention: Changing the Current of Trade*, 97 J. DEV. ECON. 73, 73 (2012).

210. *See* Hassan, *supra* note 93, at 13–14.

211. *See* A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra*

that signatories prosecute acts of corruption and sets forth a peer-review mechanism to review anti-corruption laws of the signatories.[212] UNCAC also "establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, and enhanced accounting and auditing standards for the private sector."[213] UNCAC has broader support than the OECD Convention, with 163 countries as members.[214]

UNCAC draws upon earlier international efforts to prosecute corruption, such as the Inter-American Convention Against Corruption ("IACAC"), which was the first international convention on anti-corruption and was ratified in March 1996 by member states of the Organization of American States.[215] Like the OECD and UNCAC, member parties to the IACAC must criminalize bribery and other acts of corruption.[216] Compliance with the IACAC is monitored by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption ("MESICIC").[217] There are currently thirty-one countries subject to the MESICIC.[218]

Similarly, in 1999, the Council of Europe set forth its own anti-corruption efforts in the form of the Group of States Against Corruption ("GRECO").[219] GRECO oversees whether adopting nations have complied with European anti-corruption laws, including prohibitions on bribery.[220] GRECO member states are not required to be part of the Council of Europe.[221] The United States, along with forty-five European nations, are currently GRECO members.[222]

However, UNCAC, IACAC, and GRECO's efficacy is marred by many of the same limitations that the OECD Convention faces. Like the OECD Convention, anti-corruption efforts under these treaties cannot be enforced against non-signatories.[223] Further, efforts pursuant to these treaties merely

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note 197; *see also* Hassan, *supra* note 93.

212. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 8.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See id.* at 7–8 (explaining that although all signatories to anti-corruption treaties

assist nations in implementing domestic laws of corruption but do not have a single body, tribunal, or other mechanism to oversee efforts where multiple nations are affected by corruption, or where an individual nation lacks resources to adequately prevent or prosecute pervasive corruption occurring within its borders.

### *C. Current Efforts Ignore Certain Negative Ramifications Associated with Prosecuting Corruption*

Finally, many of the foregoing international efforts have failed to address certain negative ramifications associated with prosecuting corruption. For example, sanctioning an entity, thus barring it from participating in public works contracts, could lead to bankruptcy of that entity, which would in turn lead to unemployed workers.[224] If the public works contractor is a large firm, as was Odebrecht, its bankruptcy could lead to significant unemployment in the region.[225] Such bankruptcy could destabilize the immediate region and may prevent the public infrastructure project from being created altogether.[226]

### *D. The Export-Import Bank of the United States Provides a Mixed Prosecution Model to Halt Corruption*

The EXIM Bank bears certain structural similarities to MDBs and engages in large-scale cross-border transactions in nations around the world. The EXIM Bank is the official export credit agency of the United States and engages in lending transactions that are considered too risky for the private sector to pursue.[227] Loans through the EXIM Bank are backed through the full faith and credit of the United States.[228] Despite the inherent risks associated with these transactions, the EXIM Bank maintains a consistently low default rate.[229] The Bank's low default rate may be

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review and assist in monitoring the implementation of anti-corruption efforts in signatory countries, each signatory must enact their own domestic and foreign anti-corruption laws).

224. *See* BEITTEL ET AL., *supra* note 30, at 36 (stating that "a key constraint on firms being barred from public works contracts because of corruptions is the threat of bankruptcy . . . .").

225. *Id.*

226. *Id.*

227. *About Us*, EXPORT-IMPORT BANK OF THE UNITED STATES, https://www.exim.gov/about (last visited Apr. 25, 2020) ("When private sector lenders are unable or unwilling to provide financing, EXIM fills in the gap for American businesses by equipping them with the financing tools necessary to compete for global sales.").

228. *Id.*

229. *Id.*

attributed to the agency's Office of the Inspector General ("OIG"), which conducts audits, inspections, and investigations on behalf of the Bank.[230]

The EXIM Bank's approach differs significantly from that of development banks in a key way — instead of merely waiting until the corruption has progressed and then "debarring" or taking other retaliatory action against an entity, the EXIM Bank can take steps to stop the corruption immediately and may rely upon the assistance of the U.S. Department of Justice and other agencies to reclaim misappropriated assets.[231] The EXIM Bank has emphasized to Congress the OIG's significant ability to halt corruption, noting that before OIG's creation, EXIM's "limited investigative and prosecutive efforts in prior years contributed to a perception that defrauding EXIM Bank did not carry significant risk, particularly for foreign parties," and that "[t]he lack of effective deterrence encouraged others to attempt similar crimes."[232]

The OIG has been very effective: since 2009, its efforts have led to 104 indictments or "informations" and eighty convictions.[233] The OIG, assisted by the U.S. Department of Justice ("DOJ"), has recovered $340 million in misappropriated funds, despite having an operating budget of only $41 million during the same period.[234] The OIG and the DOJ have also arrested defendants on criminal charges in a number of foreign countries including United Arab Emirates, Argentina, and Mexico.[235]

The EXIM Bank has also increasingly relied upon technology and information sharing to reduce the likelihood of nonrepayment. Prior to approving a financial transaction, the agency looks at self-certifications, credit reports, and reports by third party vendors, such as Thomson Reuters World Check database, which "currently checks over 20 different watch lists and other databases, including list of entities excluded from doing

230. FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 195, at 2–4 ("Pursuant to current law, the OIG is required to supervise and report on the audit of the Bank's annual financial statements, audit compliance with the Federal Information Security Modernization Act (FISMA), report on the Bank's compliance with the Improper Payments laws, conduct a risk assessment of the Bank's purchase card programs, and comply with auditing, inspection, and investigations standards, including the Generally Accepted Government Auditing Standards (GAGAS), Quality Standards for Inspections and Evaluation, and the Attorney General's Guidelines for Investigations.").

231. *Id.* at 2 (reasoning that OIG's active scheme of investigating and arresting foreign nationals deters foreign nationals from defrauding EXIM Bank).

232. *Id.*

233. *Id.*

234. *Id.* at 2–3.

235. *Id.*

business with the federal government."[236]

### *E. U.S. Prosecution of Cross-Border Corruption Further Depicts How a Multifaceted Approach May Be Employed to Address Corruption.*

The United States has other mechanisms in place to prosecute acts of corruption that violate U.S. law but occur outside the U.S. border. For potential violations of the U.S. Foreign Corrupt Practice Act ("FCPA"), DOJ's FCPA Unit works closely with the Federal Bureau of Investigation's ("FBI") International Corruption Unit to investigate and reclaim lost assets.[237] The Department of Homeland Security and the Internal Revenue Service's Criminal Investigation Unit also assist with FCPA investigations.[238] Where applicable, the Department of Treasury's Office of Foreign Assets Control provides additional assistance in FCPA cases.[239]

If cross-border diplomatic efforts are needed to address acts of corruption, the Department of State will usually engage in such efforts.[240] The Department of State also promotes U.S. interests in reducing corruption and promoting transparency through building foreign capacity for anti-corruption efforts and entering into international treaties aiming to reduce corruption.[241] The United States has provided annual support of up to $1 billion to promote anti-corruption efforts overseas.[242]

For these reasons, a new hybrid mechanism to prosecute corruption must be created to act in tandem with prior efforts. This new mechanism would not supplant efforts by the OECD Convention, UNCAC, IACAC, and GRECO, among other bodies, but instead would merely provide an additional avenue to investigate and prosecute corruption where these mechanisms fall short.

## VI. RECOMMENDATIONS

While some other authors have postulated the creation of an international

236. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-337, EXPORT-IMPORT BANK: EXIM SHOULD EXPLORE USING AVAILABLE DATA TO IDENTIFY APPLICANTS WITH DELINQUENT FEDERAL DEBT 17–18 (2019), https://www.gao.gov/assets/700/699291.pdf.

237. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *supra* note 197, at 5.

238. *Id.*

239. *Id.*

240. *Id.* at 6.

241. *Id.*

242. *Id.*

anti-corruption court akin to other large international courts (such as the ICTY), such a court would initially be too unwieldy, expensive, and inefficient to meaningfully reduce corruption.[243] Instead, a gradual increase in collaboration in investigating and prosecuting corruption is needed. Established in multiple phases, a hybrid international anti-corruption "court" that possesses the capacity to both investigate acts of corruption and bring claims against those persons or entities should be created. The proposed court would have unique jurisdiction — it would be able to review acts of corruption associated with MDB projects, national projects, governments, and other institutions. The court would also create binding and nonbinding precedent, which it may use in subsequent decisions. The use of precedent will assist in predictability and efficiency.[244] For this approach to be effective, national governments would need to recognize the legitimacy of the court and would need to engage in information sharing with the court officials and investigators. This new body would also have authority to impose stricter sanctions on those persons or entities found to have engaged in corruption and would rely upon the assistance of national and international police forces and agencies to enforce its penalties.

A multi-phased approach for addressing corruption in large-scale international development projects would be most effective in allowing the court to gain legitimacy and would enable the court to acquire resources (both in terms of fiscal resources and expertise). During this initial phase, a unified sanctions board to prosecute acts of corruption affecting large-scale projects and investments must be created. Initially, the proposed board would involve only select entities, including other MDBs and public agencies overseeing risky cross-border transactions. The unified sanctions board could gradually be expanded to initially include those nations seeking outside assistance in investigating and prosecuting corruption. However, the board's scope would gradually expand to be accessible to,

243. *Compare* approach presented here (advocating for a malleable structure based upon increased collaboration and information-sharing between countries, and gradual implementation to promote legitimacy), *with* proposal outlined by Mark L. Wolf, *The World Needs an International Anti-Corruption Court*, 147 DAEDALUS, J. AM. ACADEMY ARTS & SCIENCES 144, 145 (2018) (proposing creation of a formal international anti-corruption court). While the author here believes that the creation of a formal international anti-corruption court would not be disadvantageous, a phasic approach that incorporates increased information-sharing and increases penalties is likely to be more effective in reducing widespread corruption and less expensive. Pursuant to this approach, different bodies could use information sharing to reduce duplication of efforts. The decisions of such bodies could then be used by other bodies to promote economy (even to the extent that the decisions of one body are not binding on another body).

244. Borda, *supra* note 176, at 298 (explaining that using external judicial decisions has apparent efficiency benefits).

and assist with, anti-corruption efforts for other UN organizations and national entities, though membership and jurisdiction would be wholly voluntary.

The proposed unified sanctions board would possess its own investigative body. This investigative body would be able to provide assistance to countries that prefer to conduct their own investigations internally. Further, although members would be capable of investigating and prosecuting cases in front of the unified sanctions board, prosecution could also be held before a national court or other international tribunal.

As the second phase of this approach, a full international anti-corruption court could be created, with its jurisdiction gradually expanded as the court develops a body of case law that would serve as precedent. This anti-corruption court would be derived from the initial phase's unified sanctions board. The proposed anti-corruption court would be complementary to existing regimes, meaning that if individual nations are adept to investigate and prosecute corruption within their country, then they would continue to be able to prosecute internally through their nation's courts. However, the international anti-corruption court's investigators and judges would have specialized expertise in prosecution and asset recovery that national governments often lack.[245] Another advantage of submitting to the court's jurisdiction would be the ability to harmonize the current regulations, which would provide a more unified international approach against fraudulent conduct. Further, unlike the ICC, the court would adhere to existing precedent and could rely upon its own prior decisions or the decisions of national governments.[246]

There are many advantages to this proposal. The creation of a new, unified sanctions board and an anti-corruption court for the MDBs and UN agencies will help with alleviating some of the shortcomings found in the current system, whereby each MDB prosecutes corruption through its own

245. Wolf, *supra* note 243, at 145 (providing the example that the United States does not allow district attorneys to prosecute local officials due to lack of legal expertise).

246. *Compare* Kimble v. Marvel Entm't, LLC., 135 S. Ct. 2401 (2015) (reaffirming the principle of stare decisis because it promotes predictable and consistent development of legal principles, reliance on judicial decisions, and perceived integrity of the judicial process), *with* Guillaume, *supra* note 165, at 9 (stating that the Court's precedent is not binding, and it will not abide by stare decisis), *and* Borda, *supra* note 175, at 294 (reporting that international courts consistently find external judicial decisions are merely persuasive and not binding), *and* Prosecutor v. Dyilo, ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute, ¶ 603 (Mar. 14, 2012) (finding that opinions of international courts are excluded from the directly applicable law under article 21 of the Statute).

sanctioning entity.[247] The creation of a new, unified sanctions board will provide a more harmonized and consistent approach to the problem of corruption and will impose a stronger and clearer signal to entities and individuals contemplating fraudulent conduct. A unified sanctions board would also address more efficiently the transparency limitations in the current reciprocity approach.[248] For instance, it will help promote information sharing and ensure that debarred entities are unable to continue to procure bids.

Once fully established, the proposed "court" would also be effective in prosecuting acts of corruption that span across multiple nations, as was seen in the Odebrecht scandal.[249] The court must have the capacity to investigate and prosecute both large- and small-scale acts of corruption — as one example, two divisions within the court, a "small-scale corruption division" and a "large-scale corruption division" (divided by the potential amount of lost funds) may be created, so that each type of case is given appropriate consideration. Such a court would be particularly beneficial for developing nations, where key government officials have frequently been found to accept bribes in exchange for certain acts or awards.[250] Allowing the international anti-corruption court to prosecute acts of corruption means that these nations can rely upon an outside, third-party resource to provide anti-corruption expertise and authority when the nation acting alone may not. The international anti-corruption court would also be able to impose fines and sanctions upon entities in multiple nations in a single decision or opinion, thus increasing efficiency and saving time and resources. In imposing sanctions, the court would be required to consider the potential effects on the immediate populace (such as unemployment and displacement) associated with possible penalties.[251]

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247. *See supra* Parts III, IV.

248. *See also* INFORMATION NOTE, *supra* note 6, at 9 (stating that the Bank Group's 'cross debarments' of other MDB's debarments are not subject to its sanctions process, and the Bank Group Management itself reviews the Bank Group's decisions to opt out of a specific debarment decision).

249. *See* BEITTEL ET AL., *supra* note 30, at 9 (demonstrating successful prosecution of corruption by multiple nations with international support after an initial settlement agreement between Brazil, Switzerland, and the United States).

250. *See id.* at 6, 10 (noting the "long-time practice of businesses and foreign corporations paying bribes to gain contracts in developing countries," as evidenced by arrests of former presidents Temer and Inacio Lula da Silva as well as other high-level government officials in Brazil in association with Odebrecht bribery investigations).

251. *Id.* at 36 (noting approaches to combatting anti-corruption should reflect country-specific circumstances especially since resisting corruption may result in bankruptcy of companies and have "destabilizing economic consequences" which leave many unemployed).

The proposed international anti-corruption mechanism will also be hallmarked by collaborative asset-recovery capacities, similar to those efforts that U.S. agencies and the EXIM Bank have installed.[252] The court could utilize national police forces (of both the affected nation and other nations) and intelligence to recover funds otherwise lost to corruption. This asset-recovery ability will allow the international anti-corruption court to, over time, fund its own operations by taking a portion of the reclaimed funds. Like the EXIM Bank's OIG, the international anti-corruption court, when fully utilized, will be able to return its operating budget by multiple times.[253] By allowing for information sharing and enforcement with signatory nations, the proposed court will also have the knowledge and police power to implement its decisions. Finally, as experienced by the EXIM Bank,[254] the penalties for engaging in corruption must be heightened — if actors believe that the penalties for engaging in corruption are particularly severe, then they will be deterred from engaging in future acts of corruption.

The proposed approach is described below:

> *1. Create a new, unified sanctions board for national governments, MDBs and UN agencies to bring allegations of corruption and bribery. The number of tiers and specific structure is not expressly described here, but the intention is for the board to become multi-tiered over time to prosecute corrupt acts of various magnitudes and types.*

A new, unified sanctions board and a system for MDBs and UN agencies to investigate and prosecute allegations of fraudulent conduct should be created. The number of tiers of the proposed unified sanctions board may be dictated based upon the relative need and the structure most beneficial to promote efficiency and ensure effective adjudication of allegations. However, the proposed structure would likely trend toward a more involved, multi-tiered mechanism, in which recourse for varied forms of

252. FY 2020 CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 195, at 2–3 (noting the EXIM OIG was created to combat the perception that one could defraud the EXIM Bank without any repercussion. Now, the EXIM OIG and the U.S. Department of Justice arrest violators "who have attempted to defraud the Bank or affiliated financial institutions." After the arrests, defendants will then repay any outstanding amounts on transactions to the EXIM Bank.).

253. *Id.* (stating that even by conservative estimates OIG has saved the federal government "several multiples of its budget").

254. *Id.* (stating that pre-OIG enforcement attempts were unsuccessful because the penalties "did not carry significant risk," and "the lack of effective deterrence" served as an incentive for other parties to defraud EXIM Bank).

corruption or bribery would be available through separate channels. Once it becomes operational, the proposed structure will likely have at least two tiers and involve both public and private sector actors, meaning that cases could be brought by public or private entities affected by corruption during large-scale projects or investments. Additionally, separate allegations for corruption or wrongdoing could be brought against public servants outside of the scope of large-scale projects if a signatory requests outside assistance in adjudicating such a case (due to bias of government prosecutors or a lack of resources, for example).

*2. Incorporate information-sharing provisions that would facilitate the unified board's access to information and serve as a potential conduit for information sharing between national agencies.*

Second, the unified board's structure should incorporate information-sharing provisions that would facilitate the tribunal's access to information, as well as serve as a potential conduit for information sharing between national agencies. As noted above, one criticism that has marred the ICC is the tribunal's lack of transparency and its failure to effectively incorporate precedent.[255] The proposed structure would more effectively integrate precedent through information sharing. Certain investigative materials created by national prosecutors could be made available to the unified board in order to prevent duplication of efforts and ensure that any decision by the board is accurate and based upon a thorough investigation. One way to address the weaknesses inherent in the existing system would be to make the new body be an implementing agency for the information-sharing parts of UNCAC.

*3. Expand the unified board to address administrative actions against civil servants engaging in corrupt acts or accepting bribes as part of their official duties.*

Third, the unified sanctions board structure should be gradually expanded to address, investigate, and prosecute administrative actions against civil servants who have been accused of committing fraudulent conduct. This will expand upon the scope and efficacy of the court's reach. Initially, the court will not prosecute criminal acts.

255. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 172, at 2 (proposing the ICC implement performance indicators in response to an increased demand from States for enhanced efficiency and transparency for States evaluation of the ICC's performance).

*4. Expand the unified board to address criminal cases against civil servants who have engaged in criminal wrongdoing relating to large-scale projects. Allegations may be brought by MDBs, UN agencies, national governments, or other similar agencies that cannot effectively prosecute the wrongdoing without the assistance of an impartial body.*

Fourth, the unified board's structure should be gradually expanded to address, investigate, and prosecute criminal cases against civil servants who have been accused for committing fraudulent conduct affecting large-scale projects, including projects for which government bids or solicitations are required. Starting with administrative actions and extending the court's authority to criminal cases will help the unified board to gradually transition into an anti-corruption court, as will be detailed in the following section.

5. *Create an international anti-corruption "court" to address fraud, corruption, and bribery in large scale projects awarded by national governments, MDBs, UN agencies, or similar agencies, as well as smaller allegations of corruption against civil servants in which a national body may be unable to impartially or effectively adjudicate.*

Fifth, an international anti-corruption "court" should be created. The proposed international anti-corruption court will be created out of the unified sanctions board and the system for prosecuting allegations for fraudulent conduct for MDBs and UN agencies as outlined in the initial phase. This court should have its own judges, which are elected through a democratic mechanism.

The proposed international anti-corruption court can be distinguished from the preceding unified sanctions board, as the court will have a significantly broader jurisdiction and will be accessible to national governments, governing bodies, MDBs, and UN agencies around the world.[256] However, the jurisdiction of the international anti-corruption court will remain complementary to existing regimes. Thus, if an individual nation believes that it has the ability to prosecute corruption internally and within its borders, that nation will have the ability to do so. This means that the international anti-corruption court's jurisdiction must be adopted by the governing nation and may reduce the court's efficacy. Nations will need to expressly sign onto the international anti-corruption court's jurisdiction.

256. *See* INFORMATION NOTE, *supra* note 6, at 15 (detailing the current unified sanctions board's jurisdiction).

Despite this shortcoming, there remain numerous advantages that nations will likely find to be strong motivation to become a member of the international anti-corruption court. The first advantage of joining the international anti-corruption court will be that the court shall possess its own investigators, who will be specially trained in complex international investigations and asset recovery. Instances of corruption often cross international borders, and an anti-corruption body within a single nation, acting alone, is often unable to effectively quash transnational corruption without the assistance of an overarching, supra-national body.[257] The court's investigators will also be trained to have particular expertise in asset recovery, including for those transactions whereby money or other assets have crossed national borders. For example, money-laundering cases often implicate a variety of different laws, cross international borders and require a team of sophisticated investigators to be able to analyze and resolve effectively.[258]

The second advantage of joining the international anti-corruption court is that the court will be able to rectify the disputes involving corruption and fraudulent conduct that implicate more than one nation. Although the opposing nations would need to submit to the international anti-corruption's jurisdiction, the court will help to impugn impartiality and fairness and will assist with maintaining positive relations among nations.

Finally, the third advantage associated with joining the international anti-corruption court is that the court will be more effective in identifying and enforcing allegations of corruption and will help to fill the gaps in anti-corruption enforcement where individual nations, MDBs, and UN bodies, working through treaties and reciprocity agreements, have been unable to do so.[259]

There is one aspect of the proposed approach that must be clarified — the author does not agree with the formalistic approach for the creation of a true "international anti-corruption court" created in the image of the ICC, ICTY, or ICTR.[260] Such rigid courts have many pitfalls, including the fact

257. *See* Webb, *supra* note 37, at 192–93 ("The flow of information, money, drugs, and arms across borders has also destroyed the illusion of corruption as a domestic political issue to be left to individual countries.").

258. *See id.* at 210–11.

259. Wolf, *supra* note 20, at 1 ("An International Anti-Corruption Court would have the potential to erode the widespread culture of impunity, [and] contribute to creating conditions conducive to the democratic election of honest officials in countries which have long histories of grand corruption.").

260. *See About the ICC*, UNITED NATIONS, https://www.icc-cpi.int/about (last visited Mar. 21, 2020) (asserting the ICC was established by the Rome Statute which serves as the court's guiding legal document); *see also International Criminal Tribunals for the Former Yugoslavia*, UNITED NATIONS, http://www.icty.org/en/about (last visited Apr.

that these entities are expensive and otherwise not cost-effective.[261] Such courts have also been criticized for being slow in their prosecution of persons engaged in international crimes. Here, the proposed approach would take into account the fact that corruption is a widespread problem perpetuated by smaller actors. Consequently, there must be a mechanism to prosecute both large-scale and small-scale actors. The international anti-corruption court shall develop mechanisms to prosecute both larger and smaller acts of corruption. Such an approach would be akin to the U.S. court system, which has both a small claims division, as well as divisions for more significant crimes.[262] Understanding that corruption arises on both a large and small scale, driven by both large and small actors, is key to effectively prosecuting corruption. Importantly, the anti-corruption court would also at least partially fund its operating expenses by reclaiming a portion of the funds otherwise lost to corruption.

## VII. CONCLUSION

To conclude, there is a critical need to create an international anti-corruption enforcement body and gradually expand its jurisdiction. A streamlined, unified approach is vital to rectifying the shortcomings of the current system. This Article postulates that there is a value in gradually establishing an international mechanism for prosecuting corruption cases. Given the weaknesses of many nations' capacity and political will to deter fraudulent acts, moving toward a unified system may assist in reducing corruption in those nations where it is most likely to occur.

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25, 2020) (stating the ICTY was established in accordance with Chapter VII of the UN Charter); *International Residual Mechanism for Criminal Tribunals for Rwanda*, UNITED NATIONS, http://unictr.irmct.org/en/tribunal (last visited last Apr. 25, 2020) (stating the International Criminal Tribunal for Rwanda was established by Resolution 955 of the UN Security Council).

261. *See International Criminal Court: 12 Years, $1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#26b9565e2405 (observing that many question whether the ICC is too expensive and ineffective to justify given its conviction rate and total expenditures in obtaining them); *see also* Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 AM. U. HUMAN RIGHTS BRIEF 1 (2008), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&https redir=1&article=1028&context=hrbrief (claiming the ICTYR spent $1.2 billion (762 million euros) and the ICTR spent $1 billion (635 million euros) in ten years of operating, a cost of between $10–15 million (6.4–9.5 million euros) per accused).

262. *Introduction to the Federal Court System*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usao/justice-101/federal-courts (last visited Apr. 25, 2020) (explaining the federal court system).

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# THE TEA ROSE-RECTANUS DOCTRINE'S GOOD FAITH TEST

NASHRAH AHMED*

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## I. INTRODUCTION

A trademark is a word, phrase, symbol, or design that is used to identify or distinguish the source of one party's goods from the goods of another.[1] A trademark owner can have common law rights, federal registration rights, or both to a distinctive mark.[2] Both common law trademarks and federally registered trademarks afford an owner protectable, exclusive rights to the use of that mark.[3] Namely, the owner of the trademark may prevent others from

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1. *See* ANNE G. LALONDE & JEROME GILSON, GILSON ON TRADEMARKS § 3.02[1] (2018).

2. *Id.*

3. *See id.* § 3.02[2]; *see also* Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1119–20 (5th Cir. 1991) (explaining that a trademark must serve as a "symbol of origin" or as an indicator of source in order to be distinctive and protectable).

using its mark.[4]

While not required for ownership, federal registration creates additional rights for trademark owners.[5] Owning a mark protects the owner from another user registering a confusingly similar mark or using the owners mark without permission.[6] Federal registration not only prevents infringement before it happens, but also allows an owner to bring a claim to stop infringement if it does occur.[7] However, ownership can also be acquired through common law, hence trademarks are widely regarded as creatures of the common law, with rights independent of registration.[8]

The Tea Rose-Rectanus doctrine is a common law trademark rule that establishes the geographic reach of trademark rights.[9] Based on two seminal United States Supreme Court cases, *Hanover Star Milling Co. v. Metcalf*[10] and *United Drug Co. v. Theodore Rectanus Company*,[11] this doctrine addresses two different types of users: first or senior users ("senior users") and second, subsequent, or junior users ("junior users").[12] It allows junior users of a trademark to continue using the mark if they are operating in good faith and are geographically remote from the senior user.[13]

The United States Supreme Court defined the primary function of a trademark in *Hanover Star Milling Co.* as "identify[ing] the origin or ownership of the article to which it is affixed;" so, if a junior user operates in a remote area, it is unlikely that consumers will be confused between the two users or will attribute ownership to the wrong user.[14] Actual use of a

4. LALONDE & GILSON, *supra* note 1, § 3.02[2].

5. *Id.*

6. *Id.* § 3.02[3].

7. *See id.* § 3.02[2].

8. *See id.* § 3.02[1]; *see also* Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 334 (1938).

9. *See generally* Stone Creek, Inc. v. Omnia Italian Design, Inc., 875 F.3d 426 (9th Cir. 2017) (detailing how the Tea-Rose Rectanus doctrine came to be and explaining the reasoning behind this common law rule).

10. 240 U.S. 403 (1916).

11. 248 U.S. 90 (1918).

12. *See Stone Creek, Inc.*, 875 F.3d at 436.

13. *Id.* at 436–37 (noting that the Tea Rose-Rectanus doctrine is not automatically defeated by a senior user filing for federal trademark registration, even though federal registration presumably entitles a senior user to nationwide protection of that mark).

14. *Hanover Milling Co.*, 240 U.S. at 412; *see also United Drug Co.*, 248 U.S. at 100 ("The reason for the rule does not extend to [a mark] employed simultaneously . . . in different markets separate and remote from each other, so that the mark means one thing in one market, an entirely different thing in another."); Grupo Gigante S.A. de C.V. v. Dallo & Co., 391 F.3d 1088, 1097 (9th Cir. 2004) (explaining that a junior user's consumers in sufficiently different locations are unlikely to know of the senior user).

specific mark in commerce is generally the only requirement to establish protectable common law trademark rights; therefore, the Tea Rose-Rectanus doctrine allows two different non-competitive users in two geographically diverse regions to establish rights to the same mark as long as the junior user is operating in good faith.[15]

Circuits have come to different conclusions regarding the determination of "good faith" in accordance with this doctrine.[16] The main issue is whether mere knowledge of another's use of a specific mark is enough to destroy good faith or if that knowledge is only part of a larger good faith test that must be accompanied by an intent to benefit from the reputation of the senior user.[17] The Seventh, Eighth, and Ninth Circuits hold that any knowledge of a senior user's mark must destroy good faith.[18] The Fifth and Tenth Circuits, on the other hand, hold that knowledge is only one factor that informs good faith analysis.[19] This Comment will analyze the split of the Seventh, Eighth, and Ninth Circuits versus the Fifth and Tenth Circuits on good faith analysis in the Tea Rose-Rectanus doctrine. This Comment will first focus on the creation of the Tea Rose-Rectanus doctrine and its application in various circuits, then analyze different approaches to this circuit split, and offer recommendations as to how knowledge factors into the good faith determinations.

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15. *See Hanover Star Milling Co.*, 240 U.S. at 412; LALONDE & GILSON, *supra* note 1, § 3.02[1].

16. *Stone Creek, Inc.*, 875 F.3d at 437 (describing the longstanding circuit split on good faith determination in the Tea Rose-Rectanus doctrine).

17. *Id.*; *see Grupo Gigante S.A. de C.V.*, 391 F.3d at 1104 ("Seeking to attract customers does not constitute bad faith . . . .").

18. *See, e.g.*, *Stone Creek, Inc.*, 875 F.3d at 438 (holding that a junior user's knowledge of prior use defeats any claim of good faith as a defense to trademark infringement); Nat'l Ass'n for Healthcare Commc'ns, Inc. v. Cent. Ark. Area Agency on Aging Inc., 257 F.3d 732, 735 (8th Cir. 2001) (applying the same approach as the 9th and 7th Circuits, stating that the junior user "adopted the [mark] in good faith, without knowledge of [the] prior use"); Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 674–75 (7th Cir. 1982) (holding that a junior user demonstrates good faith when it uses a trademark with no knowledge that anyone else is already using the same trademark, and therefore knowledge must be enough to preclude good faith).

19. *See, e.g.*, C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 700 (5th Cir. 2001) (citing El Chico, Inc. v. El Chico Cafe, 214 F.2d 721, 726 (5th Cir. 1954)) (stating that 5th Circuit precedent does not conform with the majority view, holding that knowledge of use also requires an "intent to benefit from the reputation or good will of the [senior user]" and that knowledge is not always inconsistent with good faith); GTE Corp. v. Williams, 904 F.2d 536, 541 (10th Cir. 1990) (citing Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1485 (8th Cir. 1987)) (internal citations omitted) ("While a subsequent user's adoption of a mark with knowledge of another's use can certainly support an inference of bad faith, mere knowledge should not foreclose further inquiry. The ultimate focus is on whether the second user had the intent to benefit from the reputation or goodwill of the first user.").

## II. TEA ROSE-RECTANUS DOCTRINE: CREATION AND APPLICATION

Both common law rights and federal registration rights make a mark distinctive and protectable.[20] These rights establish a senior user who has rights to the mark and may exercise those rights over any subsequent junior user.[21] Registration is not necessary for ownership, but adds to common law rights based on an intent to use the mark in interstate commerce.[22] Actual use identifying a good's source distinguishes it from similar goods and is generally the only basis for ownership under common law.[23]

The Tea Rose-Rectanus doctrine, sometimes simply referred to as "innocent local use," is a rule controlling common law ownership and actual use of the same trademark by different senior and junior users as long as they are geographically diverse from each other.[24] Generally, the first senior party to use a specific trademark has rights to that mark over any subsequent, junior user of that mark, or any trademark that is confusingly similar to that mark.[25] Courts have applied a multi-factor test to determine if the Tea Rose-Rectanus doctrine applies: a junior user has priority for the trademark if he uses the mark in (1) good faith; (2) a distinct geographic territory that is remote from the territory where the senior user is using the mark; and (3) a territory where the junior user of the mark will not be easily confused with the senior user of the mark.[26]

A senior user has priority of use in the specific geographic area in which it operates, but that does not necessarily mean that it also has priority of use in other areas.[27] The Ninth Circuit best explained this scope:

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20. *See* Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1119–20 (5th Cir. 1991).

21. *See Stone Creek, Inc.*, 875 F.3d at 436–37.

22. *See* LALONDE & GILSON, *supra* note 1, § 3.02[3].

23. *Id.* § 3.02[3][iv][D] (citing United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918)) ("The right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his . . . [o]wnership of a trademark in the United States is quite simply based on actual use of that mark in United States commerce.").

24. *See Stone Creek, Inc.*, 875 F.3d at 436 ("[C]ommon-law trademark rights extend only to the territory where a mark is known and recognized, so a later [junior] user may sometimes acquire rights in pockets geographically remote from the first [senior] user's territory.").

25. LALONDE & GILSON, *supra* note 1, § 3.02[3][c][v].

26. *Id.*; *see Stone Creek, Inc.*, 875 F.3d at 436.

27. *See* Grupo Gigante S.A. de C.V. v. Dallo & Co., 391 F.3d 1088, 1096 (9th Cir. 2004); *see also* Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 271 (4th Cir. 2003) (explaining that the "good-faith remote user defense" is an exception to the common law rule that a senior user has superior rights to its mark over any other user).

> Under this rule, already established common law rights are carved out of the registrant's scope of protection. In other words, the geographic scope of the senior user's rights in a registered trademark looks like Swiss cheese: it stretches throughout the United States with holes cut out where others acquired common-law rights prior to the registration.[28]

This Swiss cheese analogy is easy to visualize when discussing how a user could develop a trademark that is either identical to, or confusingly similar to, another trademark already in use in a completely remote location.[29] If the geographic location of the junior user is sufficiently distinct and remote from the location of the senior user, it is possible the junior user has no knowledge of the senior user.[30] Circuits differ as to how much weight this knowledge has and whether it should preclude good faith.[31]

Much of the Tea Rose-Rectanus doctrine is codified in the Lanham Act, the federal statute governing trademarks and service marks.[32] It defines a trademark as a word, logo, or other device that identifies the source of a product and distinguishes it from competitors.[33] If a trademark is considered valid and protectable, infringement occurs when another's use can cause confusion or mistake, or deceive consumers.[34]

The Lanham Act only discusses federal trademark registration but is still used to protect unregistered marks.[35] In *Two Pesos, Inc. v. Taco Cabana, Inc.*,[36] the United States Supreme Court stated that the same principles

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28. *Stone Creek, Inc.*, 875 F.3d at 436 (citations omitted).

29. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 314 (1988) (Brennan, J., concurring in part and dissenting in part); *see also Stone Creek, Inc.*, 875 F.3d at 436 (citing 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 26:31 (4th ed. 2017)).

30. *See K Mart Corp.*, 486 U.S. at 314–15 (Brennan, J., concurring in part and dissenting in part); *Stone Creek, Inc.*, 875 F.3d at 436 ("Under this rule, already-established common-law rights are carved out of the registrant's scope of protection."). *But see Stone Creek, Inc.*, 875 F.3d at 433–34 (explaining that two parties operating in different geographical areas may still sell goods in converging market channels, evidenced by Stone Creek using its website to participate in a market outside of its specific geographic area).

31. *Stone Creek, Inc.*, 875 F.3d at 437 (describing the longstanding circuit split on good faith determination).

32. *See generally* Lanham Act (Trademark Act of 1946), 15 U.S.C. § 1051 (2018) (codifying an owner's trademark rights).

33. *Id.* § 1127.

34. *See id.* § 1125(a).

35. *See* LALONDE & GILSON, *supra* note 1, § 3.02[1][ii]; *see also* 15 U.S.C. § 1125(a) (prohibiting use in commerce of "any word, term, name, symbol, or device . . . [that] is likely to cause confusion . . . as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.").

36. 505 U.S. 763 (1992).

qualifying a mark for registration apply when deciding whether an unregistered mark is protected by common law.[37]

Specific sections of the Lanham Act make it clear that a junior user's knowledge of a senior user is the most important part of a good faith determination.[38] For instance, Section 1115 requires a junior user's mark to be "adopted *without knowledge* of the registrant's prior use," meaning that the Tea Rose-Rectanus doctrine applies based on knowledge.[39]

Similarly, Section 1057 states that federal registration of a mark is evidence of ownership and grants the right to use that mark in commerce.[40] Later users are assumed to have knowledge of a mark that has been federally registered because a listing on the federal register serves as constructive notice to any junior user of a mark.[41] Being listed on the federal register is constructive notice that confers "a right of priority, nationwide in effect . . . against any other [user]."[42]

### *a. Creating the Tea Rose-Rectanus Doctrine*

One of the seminal United States Supreme Court cases that established the Tea Rose-Rectanus doctrine is *Hanover Star Milling Co.*, which is widely known as the Tea Rose case.[43] Hanover Star Milling Company ("Hanover Star"), an Illinois flour manufacturer, brought this action to stop another

37. *Id.* at 768 ("[I]t is common ground that § 43(a) [§ 1125 of the Lanham Act] protects unregistered trademarks and that the general principles qualifying a mark for registration . . . are for the most part applicable in determining whether an unregistered mark is entitled to protection . . . ."). *But see* LALONDE & GILSON, *supra* note 1, § 3.02[2][a][i] (stating that the definition of trademarks from § 1127 does not strictly apply to every case, since the Lanham Act does not specifically refer to unregistered marks as such).

38. *See* Stone Creek, Inc. v. Omnia Italian Design, Inc., 875 F.3d 426, 439 (9th Cir. 2017).

39. *Id.* (citing Lanham Act, 15 U.S.C. § 1115(b)(5)).

40. *Id.* (citing Lanham Act, 15 U.S.C. § 1057(b)) ("A certificate of registration of a mark . . . shall be prima facie evidence of the validity . . . of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark.").

41. *Id.* (citing Lanham Act, 15 U.S.C. §§ 1057(c), 1072) ("Registration of a mark on the principal register . . . shall be constructive notice of the registrant's claim of ownership."); *see also* Value House v. Phillips Mercantile Co., 523 F.2d 424, 429 (10th Cir. 1975) ("[T]he constructive notice provision of § 1702 has eliminated the defense of a subsequent user that he had adopted the mark in his area in good faith and with lack of knowledge.").

42. Lanham Act, 15 U.S.C. § 1057(c).

43. Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 403, 406–08 (1916) (explaining that the same parties had two separate cases in different circuits with the same facts but with different outcomes, which prompted the United States Supreme Court to hear the cases together and address both in one opinion).

manufacturer from selling flour under the name "Tea Rose."[44] Hanover Star had been selling under this name for over twenty-seven years and had associated distinctive markings with the Tea Rose brand.[45] This brand was well known as the only flour advertised and sold under this name in Alabama, Georgia, and Florida; therefore, the reputation of Hanover Star was strongly tied to the reputation of Tea Rose flour.[46]

Another flour manufacturer based out of Ohio, the Allen & Wheeler Company ("Allen & Wheeler"), had also adopted the words "Tea Rose" as a trademark as early as 1872 and was using markings very similar to Hanover Star's markings.[47] These were also used in Allen & Wheeler's advertising, but the company could not show which markets it regularly reached.[48] Allen & Wheeler could not prove the time, place, or circumstances that it used the markings in advertisements in Alabama or any surrounding states but could definitively prove that it did not actually sell any flour in these areas.[49]

Hanover Star, however, showed that it independently began using the name "Tea Rose" for its flour in Alabama, Mississippi, Georgia, and Florida in 1885.[50] Hanover Star adopted this mark in good faith and without knowledge or notice that Allen & Wheeler was also using the mark, and the parties could not show that there was any competition between their products.[51]

In this case, the U.S. Supreme Court explained that if the junior user uses the same mark on similar goods, it implies that its goods are of the senior user's production.[52] Consumers might be confused into buying from the junior user while believing they are buying from the senior user, causing the junior user to benefit from the senior user's reputation and consumer base

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44. *Id.* at 406–07.

45. *Id.* at 406 (stating that Hanover Star began using the mark in 1885 and describing the distinctive markings as the words "Tea Rose" printed with three roses on various sacks and barrels).

46. *Id.* (describing the different ways in which the distinct mark was used throughout these states); *see also id.* at 410 (stating that Hanover Star was widely known in the area as the "Tea Rose company" and its mill was widely known as the "Tea Rose mill"); LALONDE & GILSON, *supra* note 1, § 3.02[2][c][iv] (explaining that a junior user's innocent remote use argument will lose credibility if a mark is well known and already associated with the senior user).

47. *Hanover Star Milling Co.*, 240 U.S. at 406–07.

48. *Id.* at 409 (explaining that Allen & Wheeler only sold 75 barrels in Cincinnati, 100 barrels in Pittsburgh, and 100 barrels in Boston in the 1870's).

49. *Id.* at 409.

50. *Id.* at 410.

51. *Id.* (explaining that there was never proof of competition between the parties because neither party advertised or sold its flour in the same territory).

52. *Id.* at 412.

while also depriving the senior user of profits to which it was originally entitled.[53] This creates unfair competition based on trademark infringement.[54]

The Court decided that if the two users are competing in the same market and if there is a high risk of confusion, the prior application decides who is the rightful user, but this does not apply if there is no overlap in competing markets.[55] In this case, the defendants were using the mark in a completely different region and did not know of the plaintiffs' prior use.[56] Because of this, the defendants could not unfairly benefit from the plaintiffs' reputation and must have been acting in good faith.[57] This case created the first and most debated prong of the Tea Rose-Rectanus doctrine: the requirement that a junior user's trademark rights rely upon good faith usage.[58]

The other seminal United States Supreme Court case of the Tea Rose-Rectanus doctrine is *United Drug Co. v. Theodore Rectanus Co*.[59] This case involves a Massachusetts woman, Ellen M. Regis, who began manufacturing and selling a medicine called "Rex" in 1877, then registered a trademark for it in 1898 and sold her product throughout New England.[60] United Drug Company ("United Drug") then bought the trademark rights from Regis and began manufacturing and selling the drugs in its chain of drug stores, "Rexall remedies."[61] United Drug began selling this drug in its four stores in Louisville, Kentucky, in 1911.[62]

In 1883, meanwhile, a Kentucky man represented by Theodore Rectanus Company ("Rectanus") began selling a different drug — also called "Rex"

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53. *Id.* (clarifying that courts allow for redress in cases of trademark infringement because parties have a valuable interest in the good will of their business and adopt trademarks in order to maintain or extend that good will).

54. *Id.* at 413 (citing to Elgin Watch Co. v. Ill. Watch Co., 179 U.S. 665, 674 (1900)) (stating that business's strong reliance on good will causes common law trademark cases to be considered a part of the broader field of unfair competition law)*; see* LALONDE & GILSON, *supra* note 1, § 3.02[3][a][ii] (explaining that while the Lanham Act does not give requirements for unregistered trademarks to be valid, they are still protected under law).

55. *Hanover Star Milling Co.*, 240 U.S. at 415 (citing Columbia Mill Co. v. Alcorn, 150 U.S. 460, 464 (1893)).

56. *Id.* at 409–11.

57. *See id.* at 410–11 (considering that the defendant and the plaintiff were selling in different regions).

58. *See* LALONDE & GILSON, *supra* note 1, § 3.02 [3][c][v].

59. 248 U.S. 90 (1918).

60. *Id.* at 94 (describing that the name "Rex" was used on boxes, packaging, and advertising in regular use of a common law mark).

61. *Id.*

62. *Id.*

— throughout the Louisville area.[63] Before United Drug's 1912 expansion, neither company knew of the other's use of the mark.[64]

When United Drug sued Rectanus for trademark infringement and unfair competition, the United States Supreme Court held that a trademark owner cannot have territorial rights for a mark where the owner does not do business.[65] If the mark is being used in good faith in a completely different geographic area, the senior user does not automatically have ownership rights in that area if it does not conduct business there.[66] Even though United Drug owned the mark first, Rectanus developed and began using the mark in good faith, with no knowledge of the other user.[67] United Drug primarily used the mark in New England and later expanded into Kentucky, while Rectanus used the mark independently in Kentucky for some time.[68] Therefore, Rectanus was allowed to keep using the mark in good faith.[69] This case established the second and third prongs of the Tea Rose-Rectanus doctrine, which differentiate a junior user's distinct and remote geographic territory from the territory where the senior user is using the mark.[70]

### *b. Circuits A: Seventh, Eighth, and Ninth Circuits*

The Seventh, Eighth, and Ninth Circuits, on one side of the Tea Rose-Rectanus doctrine's circuit split, all hold that simple knowledge of another's use of a trademark is enough to preclude good faith.[71] These circuits believe that a junior user with knowledge of a senior user's mark could not

63. *Id.* (explaining briefly that the two medicines in question had different purposes: United Drug's Rex treated dyspepsia, while Rectanus's Rex was considered a blood purifier).

64. *See id.* at 94–95 (explaining that Rectanus spent a considerable amount building its brand in Louisville and the surrounding areas, "so that — except for [United Drug's] prior adoption of the word in Massachusetts, of which he was entirely ignorant — [Rectanus] was entitled to use the word as [its] trademark.").

65. *Id.* at 95–96 (stating that this action was based on allegations of unfair competition, justified only by trademark infringement); *id.* at 97–98 ("The owner of a trademark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly.") (citations omitted).

66. *Id.*

67. *Id.* at 98–100.

68. *See id.* at 98–99.

69. *Id.* at 100.

70. *Id.* at 101.

71. *See, e.g.*, Stone Creek, Inc. v. Omnia Italian Design, Inc., 875 F.3d 426, 438 (9th Cir. 2017); Nat'l Ass'n for Healthcare Commc'ns, Inc. v. Cent. Ark. Area Agency on Aging Inc., 257 F.3d 732, 735 (8th Cir. 2001); Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 674–75 (7th Cir. 1982).

coincidentally choose the same mark.[72] The junior user must be aware that its actions negatively impact the senior user, since the junior user is knowingly, if not intentionally, capitalizing on the senior user's goodwill and potentially blocking the senior user from expanding its business into a new area.[73] These circuits state that simple knowledge, without any additional proof of intent, is enough to show that the junior user has acted in bad faith.[74]

A 2017 Ninth Circuit case, *Stone Creek, Inc. v. Omnia Italian Design, Inc.*,[75] is the most recent case holding that knowledge is enough to preclude good faith.[76] Omnia Italian Design, Inc. ("Omnia") was a leather furniture manufacturer that admitted to infringing on a trademark owned by its ex-business partner, Stone Creek, Inc. ("Stone Creek").[77] Stone Creek was also a manufacturer that sold furniture through five showrooms in Phoenix, Arizona.[78] In 1990, Stone Creek created and started using its own logo, which it trademarked in 1992, but did not federally register until 2012.[79]

Omnia and Stone Creek became business partners in 2003, working under an agreement that Omnia would manufacture furniture branded with the Stone Creek mark and Stone Creek would then sell that furniture.[80] Omnia's unauthorized use was mainly on furniture manufactured for Bon-Ton Stores, Inc. ("Bon-Ton"), which sold Omnia's Stone Creek-labeled furniture to consumers throughout the Midwest.[81] Bon-Ton wanted to make Omnia its only leather furniture supplier but asked Omnia to design a label that sounded "more American."[82] When Bon-Ton chose the label "Stone Creek," Omnia recreated Stone Creek's logo directly from its company materials and used the mark on many different internal supplies.[83] Omnia also designed

72. *Stone Creek, Inc.*, 875 F.3d at 439 (citing MCCARTHY, *supra* note 29, § 26.12).

73. *Id.* ("[A] user like Omnia knows that its actions come directly at the expense of the senior user, potentially blocking the senior user from entering into the new market . . . the junior user acted in bad faith, which 'serves as evidence that the senior user's mark, at least in reputation, has extended to the new area.'") (citing *Developments in the Law Trade-Marks and Unfair Competition*, 68 HARV. L. REV. 814, 859 (1955) and MCCARTHY, *supra* note 29, § 26.12).

74. *See id.*

75. 875 F.3d 426 (9th Cir. 2017).

76. *Id.* at 439.

77. *Id.* at 429.

78. *Id.*

79. *Id.* at 430 (stating that it waited twenty years to register its trademark and describing the mark as "a red oval circling the words 'Stone Creek' for various types of furniture").

80. *Id.*

81. *Id.* at 430.

82. *Id.*

83. *Id.*

warranty cards with the Stone Creek mark and used these items to sell furniture in Bon-Ton's galleries and online.[84] During this time, Stone Creek applied for, and received, a federal trademark registration.[85]

The Ninth Circuit held that because Omnia clearly knew that the mark belonged to Stone Creek and continued to use it, Omnia was not acting in good faith and could not invoke the Tea Rose-Rectanus doctrine as a defense.[86] The Ninth Circuit argued that joining the Seventh and Eighth Circuits in this split was the more appropriate holding, as it created a knowledge standard that better conforms with the statutory language in the Lanham Act.[87] The Ninth Circuit also held that the Tea Rose-Rectanus doctrine did not apply because Omnia was a "non-innocent remote user who acquired no common law trademark rights."[88] Omnia even admitted that it adopted Stone Creek's trademark when it had indisputable knowledge of Stone Creek's use of the mark, confirming that Omnia was not operating in good faith under the Seventh and Eighth Circuits' rationale.[89]

### *c. Circuits B: Fifth and Tenth Circuits*

The other perspective on this circuit split is that of the Fifth and Tenth Circuits, which hold that knowledge is simply one element informing good faith, rather than an element that automatically excludes good faith.[90] These circuits recognize that a junior user's knowledge of another senior user's mark can undoubtedly support a finding of bad faith.[91] However, the circuits held that knowledge should not prevent further inquiry into whether the junior user acted in bad faith with the intent to benefit from the reputation or goodwill of the senior user.[92]

The more recent of these cases, *C.P. Interests, Inc. v. California Pools,*

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84. *Id.* at 430–31.

85. *Id.* at 430.

86. *Id.* at 438 (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 314 (1988)) (holding that knowledge of prior use defeats any claim of good faith).

87. *Id.* at 439.

88. *Id.*

89. *Id.*

90. *See, e.g.*, C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 700 (5th Cir. 2001) ("[M]ere knowledge of defendant's use of the mark does not defeat good faith, though it is a factor you may consider . . . ."); GTE Corp. v. Williams, 904 F.2d 536, 541 (10th Cir. 1990).

91. *GTE Corp.*, 904 F.2d at 541 (holding that knowledge of a mark and intent to compete with that mark is not equivalent to the intent to mislead or confuse consumers); *see also* El Chico, Inc. v. El Chico Cafe, 214 F.2d 721, 726 (5th Cir. 1954) (noting that knowingly using another's mark does not necessarily equate to bad faith).

92. *See GTE Corp.*, 904 F.2d at 541 ("[M]ere knowledge should not foreclose further inquiry."); *El Chico, Inc.*, 214 F.2d at 726.

*Inc.*,[93] held in 2001 that mere knowledge of the senior user's mark does not defeat good faith but may be considered an important factor in determining good faith.[94] This case involved a senior user, California Pools, which was established and began using the mark "California Pools" in 1952, and a junior user, C.P. Interests, which began using the mark "California Pool Repair & Service Company" in 1961.[95] C.P. Interests was a Texas corporation that primarily worked in pool service and repair, while California Pools was a California corporation that primarily worked in pool and spa construction.[96] California Pools was interested in expanding to Houston, Texas, in 1997, at which time it discovered that C.P. Interests had been independently using the same name.[97]

California Pools informed C.P. Interests of its intent to expand into the Houston market, requesting that C.P. Interests stop using the mark.[98] The court, however, held that C.P. Interests was a remote junior user of the mark and had attained the right to use it.[99] In contrast with the Seventh, Eighth, and Ninth Circuits, the Fifth Circuit justified this holding by stating that knowledge is not the only important consideration.[100] The Fifth Circuit refused to join the majority view, arguing that good faith determination should be done through a two-factor test, with knowledge of use and intent to benefit going hand in hand.[101]

Similarly, *GTE Corp. v. Williams*[102] is a 1990 Tenth Circuit case involving a senior user, General Telephone Corporation ("GTE"), formed in 1935 and a junior user, David Williams, who formed "General Telephone" in 1974.[103] GTE received federal registration in 1982 and then brought this suit, but the court found Williams was a good faith junior user.[104] Williams was granted

93. 238 F.3d at 690.

94. *Id.* at 700 (explaining the concept of good faith and defining the doctrine as when "a senior user has exclusive rights to a distinctive mark anywhere it was known prior to the adoption of the junior user and has enforceable rights against any junior user who adopted the mark with knowledge of its senior use." (citing A.J. Canfield Co. v. Honickman, 808 F.2d 291, 295 n.4 (3d Cir. 1986)).

95. *Id.* at 692.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 692, 702.

100. *Id.* at 700.

101. *Id.* at 700–01 (citing El Chico, Inc. v. El Chico Cafe, 214 F.2d 721, 726 (5th Cir. 1954)).

102. 904 F.2d 536 (10th Cir. 1990).

103. *Id.* at 537.

104. *Id.* at 537, 542.

exclusive use in the Utah region where he operated.[105]

The Circuit also determined that Williams did not have enough knowledge that GTE or any other entity used the name "General Telephone" as a trademark, despite admitting to having once heard of a company called "General Telephone and Electronics of California."[106] GTE argued that any level of knowledge should, by itself, defeat a good faith claim, but the Tenth Circuit held that even though a junior user's adoption of a trademark with knowledge strongly supports a finding of bad faith, knowledge still should not take away from the ultimate focus of intent to benefit.[107] In this case, the Tenth Circuit determined that though Williams had briefly heard of GTE, he never intended to benefit from GTE's reputation or goodwill and was a good faith junior user.[108]

## III. ANALYZING THE DIFFERENT CIRCUITS' APPROACHES TO THE SPLIT

The Tea Rose-Rectanus doctrine allows a junior user to have priority for a trademark over the senior user in a certain territory, as long as he uses that mark in "good faith," the territory is remote from the senior user, and consumers would not easily confuse the two users.[109] Good faith is the most important and also most disputed prong of this test, since a user operating in bad faith is dispositive to a Tea Rose-Rectanus doctrine defense.[110]

The main issue on which the circuits disagree is whether simple knowledge of a senior user's earlier use of a trademark can preclude a junior user's good faith or if good faith must be determined through a two-factor test: knowledge of a senior user's mark accompanied by a junior user's intent to benefit from the reputation or goodwill of that user.[111] Circuits A

105. *Id.* at 538–39 (citing 15 U.S.C. §§ 33(b)(5), 1115(b)(5) (2012)) (justifying that Williams clearly lacked intent to confuse consumers or benefit from GTE's reputation in Wasatch Front, Utah).

106. *Id.* at 541–42.

107. *Id.* (citing Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1485 (10th Cir. 1987)); *see* General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 627 (8th Cir. 1987); Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 674–75 (7th Cir. 1982) (conceding that knowledge can preclude good faith, but still holding that intent to benefit is more important).

108. GTE Corp. v. Williams, 904 F.2d 536, 541–42 (10th Cir. 1990).

109. LALONDE & GILSON, *supra* note 1, § 3.02[3][c][v] (articulating the Tea Rose-Rectanus doctrine's multifactor test and emphasizing that the Lanham Act does not allow senior users to obtain injunctions against good faith junior users who are operating in good faith and in a geographically remote territory).

110. Stone Creek, Inc. v. Omnia Italian Design, Inc., 875 F.3d 426, 436 (9th Cir. 2017) (explaining that the reasoning of this case focuses mainly on good faith use, as a lack of good faith should always be dispositive in any trademark infringement case).

111. *See* C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 700 (5th Cir. 2001) (citing El Chico, Inc. v. El Chico Cafe, 214 F.2d 721, 726 (5th Cir. 1954)); *GTE Corp.*,

(the Seventh, Eighth, and Ninth Circuits) hold that a junior user's knowledge of a senior user's previous use of a trademark automatically precludes good faith, therefore preventing the junior user from invoking the Tea Rose-Rectanus doctrine as a defense in an infringement case.[112] Circuits B (the Fifth and Tenth Circuits), on the other hand, have ruled that knowledge is only one element of many that can be used to determine whether a junior user is acting in good faith, rather than something that can automatically exclude good faith.[113] Both groups of circuits specifically state that very similar or easily interchangeable trademarks can still be used by a junior user who has knowledge of the senior user's use without any real infringement on the senior user's mark if there is no actual confusion and no intent to deceive consumers or benefit from the reputation and goodwill of another user.[114]

*a. Applying United States Supreme Court Precedent*

In their various opinions, Circuits A regularly examined the Tea Rose-Rectanus doctrine's origin cases to justify why knowledge alone is enough

904 F.2d at 541 (citing *General Mills, Inc.*, 824 F.2d at 627). *See generally Stone Creek, Inc.*, 875 F.3d at 437 (providing a brief summary of the perspectives of each side of this longstanding circuit split).

112. Nat'l Ass'n for Healthcare Commc'ns v. Cent. Ark. Area Agency on Aging, Inc., 257 F.3d 732, 735 (8th Cir. 2001) (determining that junior users adopting a trademark in good faith must have done so without knowledge of prior use); *Money Store,* 689 F.2d at 674–75 (ruling that a junior user can only be operating in good faith if it uses a mark with no prior knowledge that any other party is already using the same or a confusingly similar mark); *see, e.g.*, *Stone Creek, Inc.*, 875 F.3d at 439 (holding that any knowledge of prior use must defeat a claim of good faith, as users cannot coincidentally use a confusingly similar mark while knowing that someone is using the same).

113. *GTE Corp.*, 904 F.2d at 541 (emphasizing the importance of focusing on the intent to benefit from the good will or reputation of the senior user, rather than utilizing knowledge of use as an automatic inference of bad faith when using the Tea Rose-Rectanus doctrine as a defense against trademark infringement); *see, e.g.*, *C.P. Interests, Inc.*, 238 F.3d at 700 (refusing to agree with the view of the majority of circuits, instead ruling that knowledge is not always inconsistent with good faith and must be accompanied by an intent to benefit from confusion with the senior user, along with any other relevant factors).

114. *See GTE Corp.*, 904 F.2d at 541 (explaining that knowledge of prior use can support an inference of bad faith) (citing Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1485 (10th Cir. 1987) and Beer Nuts, Inc. v. Clover Club Foods Co., 805 F.2d 920, 927 (10th Cir. 1986)); *see also* General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 627 (8th Cir. 1987) (explaining that knowledge and intent to compete with the product of another user are not the same as an intent to "mislead and to cause consumer confusion"); El Chico, Inc. v. El Chico Cade, 214 F.2d 721, 726 (5th Cir. 1954) (explaining the minimal importance of a junior user's knowledge of another previous use of the same mark, while emphasizing the significance of intent).

to exclude a good faith claim.[115] In *Hanover Star Milling Co.* (the "Tea Rose" case), neither the junior nor the senior user had any knowledge of the other using the same mark in another location, so the Court determined that the users could not have any intent to benefit from the other.[116] In accordance with the reasoning in this case, any examination into intent would be inconsequential in determining good faith.[117]

Similarly, in *C.P. Interests, Inc.*, the Fifth Circuit argued that knowledge is only one factor in the larger good faith inquiry.[118] However, when applying the reasoning from *Hanover Star Milling Co.* to the Fifth Circuit's holding, it is clear that knowledge is the only factor that should be of any importance.[119] In both cases, the junior and senior users were using the confusingly similar trademarks in different markets and in completely different geographic locations.[120] Each junior user also did not have any knowledge of each senior user's previous use in either case, and the junior user was allowed to continue using the mark in both.[121] Because of these similarities, the holding of *C.P. Interests, Inc.* seems to conform with the holding of *Hanover Star Milling Co.*, but the reasoning is completely different.[122] The Fifth Circuit justifies allowing a junior user's knowledge by stating that intent to benefit from another user's reputation, rather than any general knowledge of another's use, must always be the most important factor when making a good faith determination.[123]

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115. *See Stone Creek, Inc.*, 875 F.3d at 437.

116. *Id.* (recounting the Supreme Court's reasoning in *Hanover Star*).

117. *Id.* at 437–38.

118. *C.P. Interests, Inc.*, 238 F.3d at 700.

119. *Compare* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412 (1916) (reasoning that because the junior user had no knowledge of the senior user, the junior user did not commit trademark infringement), *with C.P. Interests, Inc.*, 238 F.3d at 700–01 (noting that both cases have similar facts as to knowledge and intent, with the senior and junior users in each case independently establishing common law rights to confusingly similar marks at different times and in different geographic territories).

120. *See Hanover Star Milling Co.*, 240 U.S. at 409–10; *C.P. Interests, Inc.*, 238 F.2d at 700–01 (noting that both cases come to the same conclusion of allowing each respective junior user to continue using the mark in good faith, but with two different reasonings for doing so).

121. *C.P. Interests, Inc.*, 238 F.3d at 700 (acknowledging that California Pools's contention that many courts have held that knowledge of use is enough to defeat a good faith claim is correct, but the 5th Circuit's past precedent specifically states that knowledge is not dispositive and that any good faith examination must consider multiple relevant factors).

122. *See id.* at 700.

123. *Id.* (citing El Chico, Inc. v. El Chico Cafe, 214 F.2d 721, 726 (5th Cir. 1954)) (stating that a junior user's knowledge is only one factor in a comprehensive good faith determination).

However, the Supreme Court emphasizes in *Hanover Star Milling Co.* that knowledge, rather than intent, is the only meaningful factor for determining good faith by repeatedly using the phrases "good faith" and "with no knowledge or notice" together throughout the opinion.[124] The Court first mentions this connection by saying that the trademark was "adopted and used *in good faith without knowledge or notice* that the name 'Tea Rose' had been adopted or used [by another] . . . ."[125] The Court then continues to assert that Hanover Star was not infringing on the mark, stating that it had "adopted 'Tea Rose' as its mark *in perfect good faith, with no knowledge* that anybody else was using or had used those words in such a connection . . . ."[126] The Court also points out that a junior user is acting in bad faith where it "acts fraudulently or *with knowledge of* [the senior user's] rights . . . ."[127]

This phrasing is also prevalent throughout *United Drug Co.*, clearly connecting a lack of knowledge with good faith and stating that knowledge of a senior user's mark implies bad faith.[128] By strictly applying the use of these terms and the holdings of both United States Supreme Court cases to *C.P. Interests*, it is clear that lacking knowledge of a senior user's mark is equivalent to operating in good faith.[129] This also implies that intent to benefit is not highly determinative of good faith.[130]

When reexamining *GTE Corp.* with this same analysis from *Hanover Star Milling Co.* and *United Drug Co.*, it is easy to see that this case should have come out completely different.[131] The facts in *GTE Corp.* differ from the facts in *Hanover Star Milling Co.* and *C.P. Interests, Inc.* because Williams,

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124. *See Hanover Star Milling Co.*, 240 U.S. at 410–20 (lacking any mention of intent to benefit).

125. *Id.* at 410 (emphasis added).

126. *Id.* at 412 (emphasis added).

127. *Id.* at 419 (emphasis added).

128. United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 96, 103 (1918) (describing the companies' uses of the trademarking as occurring "in perfect good faith, neither side having any knowledge or notice of what was being done by the other.").

129. *See id.* at 95, 101, 103–04 (deciding that Rectanus did not have any knowledge of United Drug Company's prior use of the "Rex" mark and thus was operating in good faith); *see also Hanover Star Milling Co.*, 240 U.S. at 410, 419 (discussing whether Hanover Star had knowledge of another's use of the "Tea Rose" mark and determining that it did not, so it was operating in good faith and could continue using the mark).

130. *See United Drug Co.*, 248 U.S. at 101; *Hanover Star Milling Co.*, 240 U.S. at 412.

131. *Compare* GTE Corp. v. Williams, 904 F.2d 536, 541 (10th Cir. 1990) (citing Value House v. Phillips Mercantile Co., 523 F.2d 424, 431 (10th Cir. 1975)) (describing Williams as good faith user despite him admitting to having knowledge of the senior user's mark), *with Hanover Star Milling Co.*, 240 U.S. at 409 (noting that Hanover Star was a good faith user because of the lack of knowledge).

the junior user, had actual and constructive knowledge that a senior user, GTE, was using a confusingly similar mark.[132] The Tenth Circuit decided that GTE could not make a valid infringement claim without showing that Williams using this mark "was likely to cause consumer confusion in the market."[133] The Circuit also decided that Williams adopted the mark in good faith regardless of the fact that he had actual knowledge of another user with an almost identical mark because he "did not select the mark for the purpose of benefiting from [the senior user's] reputation and goodwill."[134] However, applying the analysis from *Hanover Star Milling Co.* to this case, Williams should automatically be considered a bad faith user because of his knowledge that someone else, though he was not sure who, was using the same mark.[135] Similarly, applying the analysis from *United Drug Co.* to this case, Williams could not be in perfect good faith because he had "knowledge or notice of what was being done by the [senior user]."[136] Having any knowledge or notice must automatically make Williams a bad faith user.[137]

The Fifth and Tenth Circuits, just like those of Circuits A, also discuss the Supreme Court's reasoning in *Hanover Star Milling Co.* in deciding what constitutes good faith.[138] Through this analysis, the Circuits determined that if two users are independently using the same mark in good faith, a court does not need to determine if one user had knowledge of the other user's use.[139] Circuits A focused on the strong relationship between good faith and

132. *See Hanover Star Milling Co.*, 240 U.S. at 409 (concluding that Hanover did not have actual or constructive knowledge); C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 692 (5th Cir. 2001) (highlighting that C.P. Interests only learned of California Pools, Inc. when California Pools requested that C.P Interests stop using the name); *GTE Corp.*, 904 F.2d at 541 (admitting that Williams had knowledge of the senior user).

133. *See GTE Corp.*, 904 F.2d at 539 (explaining that even if the court assumed GTE had obtained a nationally valid registered trademark, GTE could not win any infringement litigation without proving that Williams', or any other junior user's, use of that mark would cause significant confusion for consumers); *see also* Lanham Act, 15 U.S.C. § 1114(1) (2012) (stating that a junior user is liable in a civil action if its use of a trademark is "likely to cause confusion, or to cause mistake, or to deceive").

134. *GTE Corp.*, 904 F.2d at 541 (quoting *Value House*, 523 F.2d at 431).

135. *Compare Hanover Star Milling Co.*, 240 U.S. at 409–10 (noting that the junior user in was allowed to operate in good faith because of his lack of knowledge of the senior user's use), *with GTE Corp.*, 904 F.2d at 541–42 (finding that the junior user in was allowed to operate in good faith despite his knowledge of the senior user's use).

136. *United Drug Co.*, 248 U.S. at 95–96 (explaining that neither United Drug nor Rectanus could be a bad faith user because both were operating with no knowledge of the other).

137. *See id.*

138. *Id.* at 96–97; C.P. Interests Inc. v. Cal. Pools Inc., 238 F.3d 690, 700 (5th Cir. 2001).

139. *See Hanover Star Milling Co.*, 240 U.S. at 415; *see also* Stone Creek, Inc. v. Omnia Italian Design, Inc., 875 F.3d 426, 437–38 (9th Cir. 2017) (discussing the

knowledge, while Circuits B relied heavily on a short section in *Hanover Star Milling Co.* to resolve this issue.[140] Circuits B adopted the Supreme Court's explanation that courts do not necessarily need to determine which user has acquired the trademark in question first because:

> [W]here two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant; unless, at least, it appears[s] that the second adopter [or junior user] has selected the mark with some design *inimical to the interests of the [senior] user, such as to take the benefit of the reputation of his goods*, to forestall the extension of his trade, or the like.[141]

However, this mention of intent to benefit only occurs one time in *Hanover Star Milling Co.*, and briefly occurs one more time in *United Drug Co.* when citing to *Hanover Star Milling Co.*, but in a slightly different context.[142] In both cases, the Court instead demonstrates a strong relationship between the concepts of "good faith" and "knowledge."[143] Both cases repeatedly mention that the junior user had independently employed the same mark, and therefore must have been operating in good faith.[144]

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perspectives of circuits on the opposite side of the split). *See generally C.P. Interests Inc.*, 238 F.3d at 700 (explaining the Fifth Circuit's refusal to conform with the majority view by holding that knowledge does not always have to be inconsistent with good faith); *GTE Corp.*, 904 F.2d at 541–42 (holding that knowledge should not divert focus away from the most important prong of the Tea Rose-Rectanus doctrine, the junior user's intent to benefit).

140. *Hanover Star Milling Co.*, 240 U.S. at 415; *see, e.g.*, Stone Creek, Inc. v. Omnia Italian Design, Inc., 875 F.3d 426, 438 (9th Cir. 2017); Nat'l Ass'n for Healthcare Commc'ns, Inc. v. Cent. Ark. Area Agency on Aging Inc., 257 F.3d 732, 735 (8th Cir. 2001); Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 674–75 (7th Cir. 1982).

141. *Hanover Star Milling Co.*, 240 U.S. at 415 (emphasis added) (citation omitted); *see also United Drug Co.*, 248 U.S. at 101 (citing *Hanover Star Milling Co.*, 240 U.S. at 415) (explaining that Rectanus had no suggestion of sinister purpose when using United Drug's mark).

142. *United Drug Co.*, 248 U.S. at 101; *Hanover Star Milling Co.*, 240 U.S. at 415 ("The question of prior appropriation is legally insignificant, unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user . . . ."); *see also Stone Creek, Inc.*, 875 F.3d at 438 ("The Court [in *United Drug Co.*] repeats the 'design inimical' language as a direct quote of the language from the *Tea Rose* case and mentions offhand that the junior user did not have a 'sinister purpose.'") (citations omitted).

143. *See, e.g.*, *Hanover Star Milling Co.*, 240 U.S. at 410, 419 (stating that the "trademark was adopted and used in good faith without knowledge or notice that . . . [the mark] had been adopted or used by another" and that the junior user was operating "in good faith and without notice of the [senior user's use of the same] mark"); *United Drug Co.*, 248 U.S. at 96, 103 (noting the junior user was operating "in perfect good faith, neither side having any knowledge or notice of what was being done by the other" and selected the mark "in good faith and without notice of any prior use by others . . . .").

144. *See, e.g.*, *Hanover Star Milling Co.*, 240 U.S. at 415 ("[W]here two parties

Both opinions also specify that the junior users in each respective case must have been operating in good faith, as the junior and senior users both did not have any knowledge or any notice of the other's use.[145] Applying this strong relationship to the cases in Circuits B clearly illustrates that, doctrinally speaking, knowledge must preclude good faith.[146] The United States Supreme Court cases concerning the Tea Rose-Rectanus doctrine have all generally emphasized the importance of knowledge in a good faith determination.[147]

### *b. Applying the Lanham Act*

The holding of Circuits A can also be used to apply the language in different sections of the Lanham Act to common law trademarks to discuss the importance of focusing on a junior user's knowledge.[148] Applying the same analysis to the cases of Circuits B illustrates the ways in which these cases should have come out differently. For instance, Section 1115 of the Lanham Act requires that a junior user's mark is adopted without knowledge of prior use, consequently allowing the Tea Rose-Rectanus doctrine to be invoked or rejected based only on knowledge.[149] If the Lanham Act specifically requires that a junior user must use a mark without knowledge of any other use, it follows that a good faith junior user cannot have any knowledge.[150]

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independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other . . . ."); *United Drug Co.*, 248 U.S. at 101 (citing *Hanover Star Milling Co.*, 240 U.S. at 415).

145. *See United Drug Co.*, 248 U.S. at 101; *see also Stone Creek, Inc.*, 875 F.3d at 438–39 (citing K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 314 n.8 (1988)) (explaining that each seminal case linked good faith with knowledge multiple times).

146. *Stone Creek, Inc.*, 875 F.3d at 438–39 (citing *Hanover Star Milling Co.*, 240 U.S. at 419; *United Drug Co.*, 248 U.S. at 103; MCCARTHY, *supra* note 29, § 26:12) ("Tying good faith to knowledge makes sense in light of the policy underlying the doctrinal framework. [The doctrine intends to] protect a junior user who unwittingly adopted the same mark and invested time and resources into building a business with that mark.").

147. *See id.*; *see also* K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 314 (1988) ("[A] firm [or junior user] can develop a trademark that is identical to a trademark already in use [by a senior user] in a geographically distinct and remote area if the firm is unaware of the identity.").

148. *See Stone Creek, Inc.*, 875 F.3d at 431, 437 (stating that the Lanham Act applies to both unregistered and registered trademarks, although the Act never specifically mentions unregistered trademarks by name); *see also* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992) (explaining that the same requirements for registered trademarks to be considered protectable must also apply to all unregistered common law trademarks).

149. 15 U.S.C. § 1115(b)(5); *see Stone Creek, Inc.*, 875 F.3d at 439.

150. *See Stone Creek, Inc.*, 875 F.3d at 439.

This interpretation is extremely similar to the reasoning employed by the Supreme Court in *Hanover Star Milling Co.* and *United Drug Co.*, as previously discussed.[151] For example, in *C.P. Interests*, the junior user, C.P. Interests, did not have any knowledge of the senior user's mark, so it would still be operating in good faith under the Lanham Act's analysis.[152] In *GTE Corp.*, however, the junior user, Williams, did have actual knowledge of GTE's use of the name "General Telephone and Electronics of California."[153] Because of this, Williams could not be a good faith user under the Lanham Act.[154]

Another relevant section of the Lanham Act, Section 1057[b], specifically states that if a senior user receives federal registration for a trademark, that user is afforded nationwide rights regardless of where the user actually used that mark.[155] Later users are assumed to have knowledge of a federally registered mark that is listed on the federal register, as that clearly proves the senior user's claim of ownership.[156] This assumption serves as constructive notice, and some courts may consider this notice enough to defeat a good faith claim.[157] According to this section of the Lanham Act, the Swiss cheese metaphor from *Stone Creek, Inc.* can only apply to unregistered marks used in good faith in distinct areas prior to federal registration.[158]

Some may consider this section of the Lanham Act as negating the purpose of the Tea Rose-Rectanus doctrine by both reducing the types of cases it can apply to and prohibiting two users both operating in good faith from maintaining their common law rights.[159] But since the Lanham Act also

151. *See* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 101 (1918); Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 415 (1916).

152. *See* C.P. Interests Inc. v. Cal. Pools Inc., 238 F.3d 690, 692, 700 (5th Cir. 2001).

153. *See* GTE Corp. v. Williams, 904 F.2d 536, 541 (10th Cir. 1990).

154. *See id.* at 541–42; *see also* 15 U.S.C. § 1115(b)(5).

155. *See* 15 U.S.C. § 1057(b) ("A certificate of registration of a mark . . . shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark . . . ."); *see also Stone Creek, Inc.*, 875 F.3d at 439.

156. *See Stone Creek, Inc.*, 875 F.3d at 436, 439 (citing 15 U.S.C. § 1072) (stating that registering a mark on the principal register is considered constructive notice of ownership); *see also* Lanham Act, 15 U.S.C. § 1057(b); MCCARTHY, *supra* note 29, § 26:32.

157. *See Stone Creek, Inc.*, 875 F.3d at 439 (explaining that the Lanham Act could potentially displace the defense of the Tea Rose-Rectanus doctrine "by charging later users with knowledge of a mark listed on the federal register").

158. *Id.* at 436 (citing MCCARTHY, *supra* note 29, § 26:31) ("[T]he geographic scope of the senior user's rights in a registered trademark looks like Swiss cheese: it stretches throughout the United States with holes cut out where others acquired common-law rights prior to the registration.").

159. *See id.* at 439.

allows for concurrent use registration, some may instead consider that it supplements the doctrine by allowing two different parties who are using a mark in good faith before either party files for federal trademark registration to both continue using the mark.[160]

In *Stone Creek, Inc.*, however, the court interpreted these sections of the Lanham Act slightly differently, specifying that if federal registration and the subsequent constructive notice occur after the good faith junior user has already been using the mark for some time, holes must be cut out of the senior owner's rights, which are stretching around the country.[161] The court also stated that a junior user with constructive notice can still seek to use the Tea Rose-Rectanus doctrine as a defense in a trademark infringement case, but the other elements of the doctrine will then weigh more heavily to determine whether the junior user will be successful.[162]

If constructive notice is considered satisfactory to defeat good faith, it is clear that actual notice must also be enough.[163] With this reasoning, neither of the junior users in *C.P. Interests* nor in *GTE Corp.* would be considered good faith junior users. C.P. Interests began using the trademark in 1961, but when California Pools filed for federal trademark registration in 1995, C.P. Interests had constructive notice of a different senior user and could not be a good faith user.[164] Similarly, Williams in *GTE Corp.* began using "General Telephone" trademark in 1974, but when GTE registered the same mark in 1982, Williams also had constructive notice of a senior user and could no longer be a good faith user.[165]

### *c. Extent of Knowledge*

The Tenth Circuit implied that a good faith determination must also consider the extent of knowledge that a junior user has about a senior user's

160. 15 U.S.C. § 1052(d) ("[I]f the [court] determines that confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks . . . concurrent registrations may be issued to such persons when they have become entitled to use such marks . . . .").

161. *See Stone Creek, Inc.*, 875 F.3d at 436 (citing 15 U.S.C. § 1115(b)(5); Johnny Blastoff, Inc. v. LA Rams Football Co., 188 F.3d 427, 435 (7th Cir. 1999)) ("[T]he Lanham Act can preserve legal and equitable defenses that could have been asserted prior to registration. Under this rule, already-established common-law rights are carved out of the registrant's [usually nationwide] scope of protection.").

162. *See id.* (reasoning that because Omnia began using Stone Creek's trademark in 2008, four years before Stone Creek received federal registration of that mark in 2012, Omnia would be able to use a Tea Rose-Rectanus defense if the other prongs applied, even though this court determined that Omnia was not acting in good faith at any time).

163. *Id.* at 439.

164. *See* C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 692, 700 (5th Cir. 2001).

165. *See* GTE Corp. v. Williams, 904 F.2d 536, 537, 541 (10th Cir. 1990).

mark.[166] The Circuit stated that Williams did not have enough knowledge that GTE or any other entity used the name "General Telephone" as a trademark, indicating that this was not enough to preclude good faith.[167] The Circuit decided this despite the fact that Williams admitted to having once heard of a company called "General Telephone and Electronics of California."[168] It is not clear if Williams was aware of what market or territory GTE operated in, so it is possible that he believed he was still a good faith user.[169] The Circuit held that this was enough for him to be a good faith user, but this does not conform with the precedent set by the *Hanover Star Milling Co.* and *United Drug Co.* cases.[170]

The United States Supreme Court briefly discusses extent of knowledge in *United Drug Co.* by comparing the facts to four previous Supreme Court cases about conscious trademark infringement.[171] In each of these cases, the defendants admitted to having knowledge of the existence of a senior user's confusingly similar mark, but for different, unrelated reasons, the junior users were still allowed to continue using their mark.[172] The Court does not delve any further into this issue other than to say that proof of infringement must be very clear for a court to grant relief.[173] The Court also states that the facts in these cases are not similar enough to apply to *Hanover Star Milling Co.*, leaving the door open for this argument.[174]

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166. *Id.* at 541.

167. *Id.* ("Williams had no knowledge that GTE used or claimed to use "General Telephone" as a trade or service mark, or that any other entity used or claimed to use that mark . . . .") (citation omitted).

168. *Id.* (finding that Williams had heard of a company named "General Telephone and Electronics of California" in the context of litigation in California when he adopted the General Telephone mark in 1974) (citation omitted).

169. *Id.*

170. *Compare GTE Corp.*, 904 F.2d at 541 (acknowledging that it is "only in unusual cases" that a junior user with knowledge can act in good faith, but still distinguishing between Williams' admitted knowledge of "General Telephone & Electrics of California" and his lack of knowledge of use of the mark "General Telephone"), *with* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412, 419 (1916) (explaining that the junior user was acting in good faith because it did not have any knowledge at all of the senior user), *and* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 101–04 (1918) (stating that both the senior and junior user acted "in perfect good faith, neither side having any knowledge or notice of what was being done by the other").

171. *United Drug Co.*, 248 U.S. at 102–03 (citing McLean v. Fleming, 96 U.S. 245 (1877); Menendez v. Holt, 128 U.S. 514 (1888); Saxlehner v. Eisner & Mendelson Co., 179 U.S. 19 (1900); Saxlehner v. Siegel-Cooper Co., 179 U.S. 42 (1900)).

172. *Id.*

173. *Id.* at 102 (analyzing these cases as proving the rule that a court ordinarily will not refuse an injunction for future protection if infringement is clear).

174. *See id.* at 103 (explaining that the facts of the four cited cases — *McLean, Menendez*, *Eisner*, *and Siegel-Cooper Co.* — were not similar enough to the facts of

The Tenth Circuit utilized this reasoning in *GTE Corp.*, where GTE argued that any level of knowledge should, by itself, defeat a good faith claim.[175] However, the Circuit still held that knowledge should not take away from the ultimate focus on intent to benefit, despite the fact that a junior user's adoption of a trademark with knowledge does, in fact, strongly support a finding of bad faith.[176] The Circuit stated that only some unusual cases have findings of a junior user adopting a mark both in good faith and with knowledge; however, this reasoning does not seem to conform with previous United States Supreme Court precedent.[177] In this case, the Circuit disregarded this precedent and still held that even though Williams had briefly heard of GTE, he never intended to benefit from GTE's reputation or goodwill.[178]

## IV. RESOLVING THE SPLIT: RECOMMENDATIONS FOR USING KNOWLEDGE IN GOOD FAITH DETERMINATIONS

Both sides of the circuit split concerning the Tea Rose-Rectanus doctrine acknowledge the importance of an objective good faith determination to award exclusive rights to a trademark.[179] However, the seminal cases of the

*United Drug Co.* to adequately compare them).

175. GTE Corp. v. Williams, 904 F.2d 536, 541 (10th Cir. 1990) ("GTE argues that the level of knowledge found by the district court, by itself, should defeat a finding of good faith.").

176. *See id.* (citing Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1485 (10th Cir. 1987); Beer Nuts Inc. v. Clover Club Foods Co., 805 F.2d 920, 927 (10th Cir. 1986) (supporting the premise that a user's adoption of a mark with knowledge of another's use can support an inference of bad faith but should not necessarily foreclose further inquiry); General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 627 (8th Cir. 1987) ("Knowledge of another's product and an intent to compete with that product is not, however, equivalent to an intent by a new entrant to a market to mislead and to cause consumer confusion.").

177. *See, e.g.*, K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 314 n.8 (1988) (ruling that a junior user can only develop a trademark that is accidentally identical or accidentally similar to a senior user's already existing mark if the junior user is unaware of that existing mark). *But see* LALONDE & GILSON, *supra* note 1, § 3.02(10)(a)(ii) (explaining that if a mark is well known to consumers in a specific territory, it is highly unlikely that a junior user can be operating in good faith without knowledge of prior use).

178. *See GTE Corp.*, 904 F.2d at 541 (emphasizing that the junior user is presumed to have actual knowledge of the mark in its territory and that should force the junior user to automatically lose its credibility to establish a good faith defense, but holding that without intent to benefit, good faith may still stand).

179. *See, e.g.*, Stone Creek, Inc. v. Omnia Italian Design, Inc., 875 F.3d 426, 439 (9th Cir. 2017) (holding the Tea Rose-Rectanus doctrine is not applicable where a defendant was not an innocent user acting in good faith); C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 700 (5th Cir. 2001) (holding district court did not abuse its discretion in issuing an objective good faith instruction, as objective knowledge of use is a factor used by the Fifth Circuit in a good faith inquiry).

doctrine, which both clearly discuss knowledge as the only determining factor for good faith, cannot be ignored.[180] In *Hanover Star Milling Co.*, the United States Supreme Court specifically states that the junior user had adopted and used the disputed mark in good faith, "without knowledge or notice" that the name was used by any other party.[181] In *United Drug Co.*, the Court awards trademark rights to the "innocent" junior user because both parties acted in "perfect good faith, with neither side having any knowledge or notice of what was being done by the other."[182]

Circuits A, or the Seventh, Eighth, and Ninth Circuits, hold that if a junior user has knowledge that a senior user is using the same trademark, that knowledge automatically precludes good faith, and the junior user cannot have any ownership rights to the mark.[183] These Circuits, relying on the seminal cases of the Tea Rose-Rectanus doctrine, have decided knowledge is the only determinative factor for a good faith junior user.[184] Because these Circuits rely heavily on both United States Supreme Court precedent and statutory interpretation of the Lanham Act, this perspective of the Tea Rose-Rectanus doctrine is the most beneficial in protecting the rights of all trademark owners and users.[185]

The opposing Circuits, or the Fifth and Tenth Circuits, hold that knowledge is only one element in what should be a multi-factored test to determine good faith.[186] This broader test is meant to focus on the intent to benefit from the reputation or goodwill of the senior user, while reducing the importance of knowledge.[187] This test is also meant to protect innocent junior users who might have little knowledge but no intent, such as Williams

180. *See*, *e.g.*, United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 103 (1918) (holding junior user could continue to use mark because it acted in good faith and established a local and valuable trade using the mark); Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 419 (1916) (reasoning where a party used a mark in good faith without knowledge of the other's use and built up a trade in its market, both could maintain use as the party was an innocent user).

181. *Hanover Star Milling Co.*, 240 U.S. at 410.

182. *United Drug Co.*, 248 U.S. at 95–96, 103.

183. *See, e.g.*, *Stone Creek, Inc.*, 875 F.3d at 438; Nat'l Ass'n for Healthcare Commc'ns, Inc. v. Cent. Ark. Area Agency on Aging Inc., 257 F.3d 732, 735 (8th Cir. 2001); Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 674–75 (7th Cir. 1982).

184. *See, e.g.*, *Stone Creek, Inc.*, 875 F.3d at 438; *Nat'l Ass'n for Healthcare Commc'ns, Inc.*, 257 F.3d at 735; *Money Store*, 689 F.2d at 674–75.

185. *See, e.g.*, *Stone Creek, Inc.*, 875 F.3d at 438; *Nat'l Ass'n for Healthcare Commc'ns, Inc.*, 257 F.3d at 735; *Money Store*, 689 F.2d at 674–75.

186. *See, e.g.*, C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 700 (5th Cir. 2001); GTE Corp. v. Williams, 904 F.2d 536, 541 (10th Cir. 1990).

187. *See, e.g.*, *C.P. Interests, Inc.*, 238 F.3d at 700; *GTE Corp.*, 904 F.2d at 541.

in *GTE Corp.*[188] However, this test can also easily allow bad faith users with knowledge and malicious intent to continue unfairly benefitting at the expense of senior users, such as Omnia in *Stone Creek, Inc*.[189]

Because of this circuit split, courts can hold trademark users to different standards depending on where in the country the user operates.[190] Cases with extremely similar facts are decided differently in Circuits A and Circuits B, while cases in the remaining circuits that have not decided how to determine good faith have no precedent. This split must be resolved in favor of the majority and allow knowledge to be the only determinative factor for a good faith junior user.

## V. CONCLUSION

The Tea Rose-Rectanus doctrine is a trademark rule that has created an exception to the general trademark rule granting a senior user of a trademark superior rights over any subsequent users of that mark. This exception allows junior users to continue using a mark that a senior user is also using as long as the junior user is operating in good faith. The Seventh, Eighth, and Ninth Circuits have split from the Fifth and Tenth Circuits by determining that knowledge of a senior user's use always destroys good faith. The Fifth and Tenth Circuits have followed a broader good faith test by regarding knowledge as one factor in a larger good faith test. This split must be resolved in favor of the majority to protect both trademark owners and good faith users.

188. *See GTE Corp.*, 904 F.2d at 539. *But see* LALONDE & GILSON *supra* note 1, § 3.02[3][c][v] (explaining that a well-known mark in a specific territory has to be well-known by most in that territory, so it is highly unlikely that a junior user could not know that it would benefit from the reputation of that well-known mark; this is what causes the junior user to lose its credibility and lose its ability to establish a good faith defense).

189. *Stone Creek, Inc*., 875 F.3d at 437.

190. *Id.* (explaining the existing split between circuits in different areas of the country).

* * *

# RAISING THE STAKES: THE BATTLE BETWEEN THE FIRST AMENDMENT AND ATHLETES' PUBLICITY RIGHTS IN THE WAKE OF *MURPHY V. NCAA*

ALEXIS NICOLE LILLY*

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## I. INTRODUCTION

Fantasy sports began in the 1960s, with the industry expanding each year since its inception.[1] Amongst those capitalizing on fantasy sports betting are FanDuel and DraftKings, two of the largest daily fantasy sports companies.[2]

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1. FANTASY SPORTS TRADE ASS'N, *History of FSTA*, https://thefsga.org/history/ (last visited Feb. 18, 2020).

2. Eric Ramsey, *The Week in Sports Betting: FanDuel and DraftKings Making All the Moves*, LEGAL SPORTS REP. (July 20, 2018, 2:15 PM), https://www.legalsportsreport.com/22178/the-week-in-sports-betting-news-july-20/ (highlighting partnerships

Players and sports unions have long asserted that athletes have a publicity right and need to be fairly compensated for the use of their image and likeness in fantasy sports.[3] Fantasy sports leagues argue that game statistics and player names are public information, and therefore the athletes have no right to compensation.[4] Although courts have different tests to determine whether athletes have an overriding publicity right, their conclusions are largely the same — the First Amendment allows these platforms to use player information free of charge because the information is in the public sphere.[5]

The conflict heightened with the 2018 Supreme Court ruling in *Murphy v. National Collegiate Athletic Ass'n*,[6] which legalized sports betting for states that enact appropriate legislation.[7] While the battle between publicity rights and the First Amendment has been seemingly settled, the national legalization of sports betting presents a new challenge for athletes.[8] Athletes and leagues can potentially capitalize on integrity fees, sponsorship deals, and in-game betting.[9]

## II. TORTS ILLUSTRATED

Fantasy sports allow consumers to pick from a roster of professional athletes and create the ultimate team, typically picking players from different teams to combine the best players in each position.[10] Each player earns points based on real-life performance, and the fantasy team with the most

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between DraftKings and FanDuel and casinos).

3. Andrew Beaton, *Players Unions Join Battle Over Publicity Rights in Potential Sports-Betting Preview*, WALL ST. J. (May 18, 2018, 1:22 PM), https://www.wsj.com/articles/players-unions-join-battle-over-publicity-rights-in-potential-sports-betting-preview-1526664138.

4. *Id.*

5. *See, e.g.*, Daniels v. FanDuel, Inc., 109 N.E.3d 390, 394 (Ind. 2018) (specifying that players' names, pictures, and statistics fall into a "newsworthy value" exception to Indiana's laws or rights of publicity).

6. 138 S. Ct. 1461 (2018).

7. *Id.* at 1484–85.

8. Irwin Raij et al., *Legalized Sports Gambling: Revenue Opportunities Following Murphy*, ALERTS & PUBLICATIONS: O'MELVENY & MYERS (Aug. 13, 2018), https://www.omm.com/resources/alerts-and-publications/alerts/client-alert-legalized-sports-gambling-revenue-opportunities-following-murphy/#.

9. *Id.*

10. Harold Stark, *What Is Daily Fantasy Sports and Why Is Everyone So Obsessed With It?*, FORBES (Dec. 9, 2017, 9:41 AM), https://www.forbes.com/sites/haroldstark/2017/12/09/what-is-daily-fantasy-sports-and-why-is-everyone-so-obsessed-with-it/#458782e1be3a (explaining that points are awarded based upon the performance of the players, and the consumers with the most points win in their league).

overall points at the end of the season wins.[11] These leagues often have a cash prize for the winner.[12]

DraftKings and FanDuel are the nation's leading fantasy sports platforms.[13] Both platforms operate similarly — by allowing users to select a team and pick from a range of contests.[14] In 2017, over fifty-nine million people in the United States and Canada participated in fantasy sports using just these two platforms.[15]

### *a. The Obsession with Fantasy Sports*

These platforms recently contracted with major sports leagues like the National Hockey League ("NHL") and the National Basketball Association ("NBA") to use game data, team names, and logos on their sites.[16] In fact, the NHL contracted with FanDuel after the Supreme Court's decision to legalize sports betting.[17] These partnerships are estimated to be worth between six or seven million dollars.[18] With the ease and accessibility of sports betting and fantasy sports, consumers now have the ability to place a range of bets, including single-play betting and daily fantasy sports.[19]

FanDuel and DraftKings run sportsbooks in states that have legalized sports gambling, widening the market for fantasy sports, especially to the

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11. *Id.* (noting that fantasy sports are typically played between friends and co-workers).

12. *Id.*

13. Dustin Gouker, *FanDuel Vs. DraftKings — Who's No. 1 In Daily Fantasy and Sports Betting?*, LEGAL SPORTS REP. (Feb. 27, 2019, 3:00 PM), https://www.legalsportsreport.com/3832/fanduel-or-draftkings/.

14. FANDUEL, *This is How You FanDuel*, https://www.fanduel.com/how-it-works (last visited Feb. 18, 2020) (listing a number of available contests in a variety of sports); DRAFTKINGS, *It's Easy to Get Started*, https://www.draftkings.com (last visited Feb. 18, 2020) (displaying a number of different sports leagues in which a user can bet on).

15. FANTASY SPORTS & GAMING ASS'N, *Industry Demographics*, https://thefsga.org/industry-demographics/ (last visited Aug. 19, 2019).

16. Zachary Zagger, *NBA Makes FanDuel New Sports-Betting Partner*, LAW360 (Dec. 18. 2018, 9:38 PM), https://www.law360.com/articles/1112686/nba-makes-fanduel-new-sports-betting-partner; Mike Esposito, *NBA and FanDuel Expand Partnership to Include Sports Betting*, FANDUEL (Dec. 20, 2018), https://www.fanduel.com/theduel/posts/6251735-nba-and-fanduel-expand-partnership-to-include-sports-betting.

17. Zachary Zagger, *NHL and FanDuel Reach Deal for Betting Partnership*, LAW360 (Nov. 5, 2018, 7:57 PM), https://www.law360.com/articles/1099014/nhl-and-fanduel-reach-deal-for-betting-partnership.

18. Kristi Dosh, *NFL Players Association Inks Licensing Deal with DraftKings*, FORBES (Sept. 29, 2015, 9:01 AM), https://www.forbes.com/sites/kristidosh/2015/09/29/nfl-players-association-inks-licensing-deal-with-draftkings/#7ca4654f374c.

19. *See, e.g.*, Stark, *supra* note 10 (discussing the ingenuity of the daily fantasy sports industry).

younger generations.[20] This increased ability to bet creates a new market for both players and teams.[21] For example, New Jersey saw close to $100 million in total wagers during August 2018 alone.[22] Currently, thirty-seven states have either enacted or proposed legislation to legalize sports betting.[23]

*b. The Right of Publicity Enters the Arena*

The Supreme Court recognized the right to publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*[24] Hugo Zacchini brought suit alleging that a television broadcasting station violated his publicity rights by filming his entire "human cannonball" performance.[25] The station then aired his fifteen-second performance on the nightly news.[26] The issue was whether Zacchini had to be compensated for the taping of his performance, or whether the broadcasting company had a First Amendment right to use the information.[27]

The Court held that while Zacchini's performance was newsworthy, he was entitled to compensation because the broadcast posed "a substantial threat to the economic value of that performance."[28] The violation only occurred because the broadcasting company filmed and aired the *entire* performance, rather than just a few seconds.[29] The Court also noted that publicity right claims are based on state law and come from a property right, "one that focus[es] on the right of the individual to reap the reward of his

20. *Id.*

21. *See* Dave Simpson, *Daily Fantasy Sports are Gambling, NY Judge Says*, LAW 360 (Oct. 29, 2018, 11:20 PM), https://www.law360.com/articles/1097160/ny-daily-fantasy-sports-in-jeopardy-after-gambling-ruling (suggesting team owners and players both share in these potential revenue gains); *see also* Rick Maese, *Games Within Games*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/graphics/2018/sports/gambling-fan-experience/?noredirect=on&utm_term=.d857fa14b73f (predicting in-game sports betting could become a $16 billion industry).

22. Eric Ramsey, *New Jersey Sports Betting Generates Nearly $100 Million in August Wagers*, LEGAL SPORTS REP. (Sept. 12, 2018, 11:43 AM), https://www.legalsportsreport.com/24005/new-jersey-sports-betting-august-revenue/ (highlighting online and mobile betting contributed more than a third of the total revenue for sportsbooks).

23. Darren Rovell, *Where is Sports Betting Legal? Projections for all 50 States*, ACTION NETWORK (last updated Jan. 10, 2020), https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections (analyzing sports betting legislation in all fifty states).

24. 433 U.S. 562, 565–66 (1977).

25. *Id.* at 563–64 (explaining that the human cannonball performance consisted of Zacchini being shot from a cannon into a net about 200 feet away).

26. *Id.* at 564.

27. *Id.* at 565–66.

28. *Id.* at 575.

29. *Id.*

endeavors . . . ."[30] Publicity rights are meant to protect individuals from the erosion of their brand, and in the case of professional athletes, their name and likeness being used for profit.[31] The Supreme Court noted that publicity rights serve the purpose of "preventing unjust enrichment by the theft of goodwill."[32] The Court further clarified that "[n]o social purpose is served by [appropriating] some aspect of [Zacchini] that would have market value and for which [defendant] would normally pay."[33]

Publicity rights present an innovative opportunity for professional athletes to earn more money.[34] *Cardtoons, L.C. v. Major League Baseball Players Ass'n*,[35] one of the first major adjudications of professional athletes' publicity rights, found in favor of the First Amendment in a dispute regarding parody baseball cards.[36] These cards used a player's likeness on the front with comedic commentary regarding his career on the back, without authorization from the Major League Baseball Players Association ("MLBPA") or the player.[37] The court used an ad-hoc balancing test to adjudicate the claim, weighing the First Amendment against the right of publicity.[38] The court ruled that a producer's First Amendment right to use players' likenesses and names for parody trading cards outweighed the players' publicity rights.[39] Affording more protection to the MLBPA would hurt Cardtoons' incentive to create because the players would not likely give

30. *Id.* at 573 (discussing the State's interest in enacting a publicity right); *see also* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996) ("[T]he right of publicity involves a cognizable property interest.").

31. Lynne M.J. Boisineau, *Intellectual Property Law: The Right of Publicity and the Social Media Revolution*, A.B.A. (May 1, 2013), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2013/may_june/intellectual_property_law_right_publicity_and_social_media_revolution/.

32. *Zacchini*, 433 U.S. at 576.

33. *Id.*

34. *See* Pamela Edwards, *What's The Score?: Does the Rights of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 581 (1998) ("The right of publicity protects athletes' and celebrities marketable identities . . . by recognizing their right to control and profit from the use of their names and nicknames, likeness, portraits, performances . . . symbolic representations, or anything else that evokes this marketable identity."). *But see Cardtoons, L.C.*, 95 F.3d at 976 (concluding that the First Amendment protections of parody outweigh the athlete's right to publicity).

35. *Cardtoons, L.C.*, 95 F.3d at 962.

36. *Id.* at 976 (using a balancing test to weigh the Major League Baseball Players Association's publicity rights and Cardtoon's First Amendment right to free speech).

37. *Id.* at 962 (explaining that a reasonable person could easily identify the professional player based on the caricature on the front of the card).

38. *Id.* at 976.

39. *Id.* (stating that these parodies add to society in the form of entertainment).

consent to make parodies of themselves.[40] These cards are valuable to the public because the game statistics provide context to the millions of viewers.[41]

Creation of fantasy sports increased professional athletes' interest in their right of publicity.[42] The court in *CBC Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*[43] adopted a balancing test between publicity rights under state law and the First Amendment.[44] This test weighed the value of public information with the athletes' ability to capitalize on their names.[45] The court concluded that the First Amendment prevailed in this test over Missouri law because the information used by CBC was readily available and "it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone."[46] The court highlighted that, even though the information used was meant for entertainment, the use of players' names and statistics for fantasy sports was still protected under the First Amendment.[47] The court rejected the argument that non-monetary claims outweigh the First Amendment because publicity rights are meant to protect financial interests, not "mental anguish."[48] Players are paid extremely high salaries, which achieves the same objectives as codifying a law to protect their name and likeness.[49] Therefore, the purpose of the right to publicity is already satisfied by their salary.[50]

The tension intensified in *Murphy* when the Supreme Court ruled that the

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40. *Id.*

41. *See, e.g.*, Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 315 (2001) ("[B]aseball fans have an abiding interest in the history of the game . . . the records set by former players and in memorable games . . . [and these records become] the standards by which the public measures the performance of today's players.").

42. *See* CBC Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P, 505 F.3d 818, 820–21 (8th Cir. 2007) (showing the argument supporting the players' right to publicity).

43. 505 F.3d 818 (8th Cir. 2007).

44. *Id.* at 823 (interpreting Zacchini v. Scripps-Howard Broad., 433 U.S. 562 (1977) to direct states to adopt a balancing test between the First Amendment and publicity claims).

45. *Id.*

46. *Id.*

47. *Id.* at 823 (concluding the use of the player's name and information is speech and entitled to the same basic First Amendment protection).

48. *Id.* (remarking that non-economic justifications are unpersuasive when balanced against the First Amendment).

49. *See id.* at 824 (stating that publicity laws are enacted to "provide incentives to encourage a person's productive activities").

50. *See id.* (comparing economic interests of a player's right to make a living off his endeavors with protecting the public from false advertising).

Professional and Amateur Sports Protection Act ("PASPA") was unconstitutional.[51] States now have the option to legalize sports betting by passing legislation.[52] Doing so allows each state to regulate its own sports betting industry.[53] At least six states have already legalized, or are making efforts to legalize, sports betting.[54] Sports platforms like FanDuel and DraftKings run sportsbooks in these states, using players' names and images in fantasy sports.[55]

While the issue was seemingly settled, the legalization of sports betting piqued professional athletes' interest in re-litigating the problem.[56] *Daniels v. FanDuel, Inc.*,[57] the first case since the Supreme Court's ruling in *Murphy*, was litigated fiercely by player's associations and FanDuel.[58] The Indiana Supreme Court ruled that a platform's use of game statistics and college players' names did not violate Indiana's publicity statute because the information fell within the newsworthy exception.[59] Therefore, the sports platforms had a First Amendment right to use the information without compensating the players.[60] Any use of players in advertisements was minimal and did not implicate an athlete's publicity right.[61]

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51. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018) (noting that supporters of legalization argue that it will deter illegal betting operations and produce revenue for the state).

52. *Id.*

53. *Id.*

54. *See* Charles H. Baker et al., *Supreme Court Overturns Third Circuit, Holds Federal Prohibition on Legalization of Sports Gambling is Unconstitutional*, O'MELVENY & MYERS (May 15, 2018), https://www.omm.com/resources/alerts-and-publications/alerts/supreme-court-overturns-third-circuit-holds-federal-prohibition-on-legalization-sports-gambling/ (listing Connecticut, New Jersey, Mississippi, New York, West Virginia, and Pennsylvania as states who are working to legalize sports betting).

55. *See* Simpson, *supra* note 21 (emphasizing that daily fantasy sports betting is unconstitutional as it relates to New York's state constitution because there is little difference between gambling like poker and daily fantasy sports).

56. *See* Raij et al., *supra* note 8 ("With the potential revenue boon from sports gambling, players' unions may have an added incentive to pursue these publicity rights or the rights to protect players' names and likeness.").

57. 109 N.E.3d 390 (Ind. 2018).

58. Beaton, *supra* note 3.

59. *Daniels*, 109 N.E.3d at 396, 398 (likening use of player's names and statistics in fantasy sports to publishing that information in newspapers or online).

60. *Id.* at 396–97 ("It is difficult to find that the use of this otherwise publicly available information is somehow drastically different such that it should be placed outside the definition of 'newsworthy.'").

61. *Id.* at 397 ("[I]t would be difficult to draw the conclusion that the athletes are endorsing any particular product such that there has been a violation of the right of publicity.").

*c. The Different Tests*

Lower courts have developed several different tests for adjudicating First Amendment and publicity right claims.[62] These tests — the relatedness test, the predominant purpose test, the transformative use test, and the ad-hoc balancing test — take different approaches and, as a result, reach different conclusions.[63]

The court in *Rogers v. Grimaldi*[64] used the relatedness test when an actress sued for a permanent injunction to stop a film that allegedly imitated her early career.[65] This test simply asks whether the use of the celebrity's likeness is related to the work as a whole.[66] The court ruled that the name of the movie, which was meant to invoke the actress's likeness, related to the film as a whole and not to the actress, and therefore she was not entitled to relief.[67]

The predominant purpose test, as the name suggests, asks whether the use of the celebrity's likeness is predominately commercial.[68] The court in *Doe v. TCI Cablevision*[69] used the predominant purpose test to find that a comic book violated Tony Twist's publicity rights.[70] Tony Twist, a former NHL player, had a reputation for being a "tough-guy enforcer."[71] However, Todd McFarlane Productions, Inc. created a comic book that included a character named "Anthony 'Tony Twist' Twistelli," a criminal that bears no physical resemblance to the professional athlete but took on the persona of an "enforcer."[72] The court found that because the predominant use of Twist's likeness was to sell comic books, McFarlane violated Twist's publicity

62. *See* Dora Georgescu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 FORDHAM L. REV. 907, 927–42 (2014) (discussing the four major tests adopted by jurisdictions).

63. *See id.* (debating the advantages and disadvantages of each test); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972 (10th Cir. 1996) (using an ad-hoc balancing test to adjudicate claim).

64. 875 F.2d 994 (2d. Cir. 1989).

65. *Id.* at 1004 (interpreting the state of Oregon's right of publicity).

66. *Id.*

67. *Id.* at 1005 (noting that the movie title was not a disguised endorsement from the actress).

68. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (ruling that use of an NHL player's likeness in a comic book violated his right of publicity because the use was "predominately a ploy to sell comic books and related products than an artistic or literary expression.").

69. 110 S.W.3d 363 (Mo. 2003).

70. *Id.* at 374, 376.

71. *Id.* at 366.

72. *Id.*

rights.[73]

The last test, the transformative use test, asks "whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."[74] Gary Saderup, Inc. produced t-shirts with the Three Stooges printed on the front.[75] While the court specifically emphasized that the quality of the transformation was not controlling, the court still ruled that the reproduction did not have a creative element.[76] Rather than using the image of the comedic trio in a creative manner, Gary Saderup, Inc. failed to add any creative element, instead producing a literal depiction of the Three Stooges.[77] Recognizing the difficulty of interpreting this test, the court added a second inquiry for cases that are a closer call.[78] The subsidiary inquiry questions whether the value of the work stems from the use of the celebrity in the product.[79] If it does, the work is less likely to enjoy First Amendment protection.[80] If it does not, the court will presume that the work is protected under the First Amendment.[81] However, the ad-hoc balancing test is used by a majority of lower courts.[82]

## III. NO PENALTY FOR SPORTS PLATFORMS

The Supreme Court's decision in *Murphy* has increased athletes' interests in protecting their name, likeness, and game statistics because platforms have more opportunities to use their image to promote the platforms.[83] Because at least six states have enacted legislation legalizing sports betting, the effects of player appropriation are more widespread than ever before.[84] Players

73. *Id.* at 374.

74. Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001).

75. *Id.* at 800–01.

76. *Id.* at 809.

77. *Id.* at 811.

78. *Id.* at 810.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 372 (Mo. 2003) (en banc) ("[C]ourts often will weigh the state's interest in protecting a plaintiff's property right to the commercial value of his or her name and identity against the defendant's right to free speech."); *see also* Kyle D. Slimcox, *Selling Your Soul at the Crossroads: The Need for a Harmonized Standard Limiting the Publicity Rights of Professional Athletes*, 63 DEPAUL L. REV. 87, 101 (2014) (highlighting the popularity of the ad-hoc balancing test).

83. *See* Raij et al., *supra* note 8 (explaining athletes' rising interest in publicity rights).

84. David Purdum, *Inside How Sports Betting Went Mainstream*, ESPN (Aug. 9,

now, more than ever, have an interest in protecting the misappropriation of their name and likeness.[85]

*a. Inconsistent Tests Produce Inconsistent Results*

Using the ad-hoc balancing test, the aforementioned cases would come out in favor of the First Amendment.[86] If the court in *Rogers* had applied the ad-hoc balancing test, it would have ruled in favor of the First Amendment because the actress's name was in the public domain.[87] Had the court applied the transformative test, again, it would not have found a publicity right violation because the movie title and the content substantially transformed the actress's likeness into a creative form.[88] The value of the work did not derive wholly from Rogers's fame, but the story that it told was about her life and how she became famous.[89] However, using the predominant purpose test, the court would have found that the predominant use of the actress's likeness was commercial, and therefore would have violated her right of publicity.[90]

If the court in *Cardtoons* had used the other tests, the results would again show inconsistency.[91] Under the predominant use test, the court would have ruled that Cardtoons had violated the baseball players' publicity rights because the predominant purpose of the parody cards was commercial.[92] Application of the transformative use test would not have resulted in a publicity right violation because Cardtoons took the players' likeness and turned it into a creative form by using catchy phrases and puns to represent

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2018), http://www.espn.com/chalk/story/_/id/24310393/gambling-how-media-daily-fantasy-new-thinking-us-pro-sports-commissioners-helped-sports-betting-become-accepted.

85. *See* Raij et al., *supra* note 8.

86. *E.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996) (accepting the First Amendment argument over the publicity rights argument).

87. *See* Daniels v. FanDuel, 109 N.E.3d 390, 396 (Ind. 2018) (recognizing the First Amendment allows use of information available to everyone).

88. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001) ("When the value of the work comes principally from some source other than the fame of the celebrity . . . it may be presumed that sufficient transformative elements are presented to warrant First Amendment protection.").

89. *See id.* (allowing for a First Amendment exception when the work is "sufficiently transformative").

90. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (critiquing both the transformative test and the relatedness test due to the lack of balancing).

91. *See Cardtoons, L.C.*, 95 F.3d at 959.

92. *See id.*; *see also Doe*, 110 S.W.3d at 375 (defining the predominant use test).

certain players.[93] Adjudication under the relatedness test would not have violated publicity rights because the use of the players' likeness in the cards was related to their sport.[94] Additionally, no one would think that the players were endorsing a parody of themselves, and therefore false advertising would not have been a concern.[95]

Applying the different tests to the facts in *C.B.C.* again highlights the confusion among the courts on how to decide these claims.[96] Had the court used the predominant purpose test, it would have found a violation for the same reason as above: the use of player names in fantasy sports is for a commercial purpose.[97] Adjudication under the transformative test would have protected the platform because it transformed the player's information into a creative form, presenting a new concept with which the public can interact.[98] Use of the relatedness test would not have resulted in a victory for the players because fantasy sports, and sports in general, clearly relate to professional athletes.[99]

Applying the ad-hoc balancing test to the facts in *Doe* would not have resulted in a publicity rights violation because Twist was in the public domain.[100] TCI Cablevision would have a First Amendment right to use the information that was available to everyone.[101] If the court had used the transformative test, it would have not found a publicity rights violation because the creator significantly transformed Tony Twist's name into a creative element by making him into a comic book character with a different likeness.[102] The relatedness test again would not result in a publicity rights violation because the use of Twist's name was related to the theme of the

93. *See Comedy III Prods., Inc.*, 21 P.3d at 811 (using Andy Warhol portraits as an example of celebrity portraits that pass the transformative use test).

94. *See* Rogers v. Grimaldi, 875 F.2d 994, 1005 (2d Cir. 1989) ("[T]he Lanham Act does not bar a minimally relevant use of a celebrity's name in the title of an artistic work where the title does not explicitly denote authorship, sponsorship, or endorsement by the celebrity or explicitly mislead as to content.").

95. *See id.*

96. *See generally* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

97. *See Doe*, 110 S.W.3d at 374 ("If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment[.]").

98. *See Comedy III Prods., Inc.*, 21 P.3d at 811.

99. *See Rogers*, 875 F.2d at 1005.

100. *See* Daniels v. FanDuel, Inc., 109 N.E.3d 390, 394 (Ind. 2018) (showing that information readily available to the public is not protected under publicity rights).

101. *See id.*

102. *See Comedy III Prods., Inc.*, 21 P.3d at 811.

comic book.[103]

The ad-hoc test would not have resulted in a publicity rights violation in *Comedy Productions III, Inc.* because the Three Stooges were public figures, and therefore Saderup had a First Amendment right to use their image.[104] Under the predominant use test, the court would have found a publicity rights violation because the t-shirts were produced for a commercial purpose.[105] If the court had used the relatedness test, it would have found a publicity rights violation because the use of the Three Stooges' faces on a shirt is wholly related to the work as a whole; in fact, it *is* the work as a whole.[106] However, the relatedness test is not directly applicable to these facts because the work, in this case the production of t-shirts, is not masking its use of celebrities — but rather a literal recreation.[107] This highlights another problem with the relatedness test because it cannot be used in every situation.[108]

*b. Which Test Is Best?*

The ad-hoc balancing test presents the fairest and most accurate way to balance each party's interest because the Supreme Court stated that "when faced with conflicting rights, the 'duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.'"[109] The goals of a balancing test best serve the public because it is the simplest test that can be applied to a variety of fact patterns.[110] This test will result in the most even application, something much needed in an already state-specific inquiry.[111] The test is best suited for fantasy sports because it only requires balancing a few specific interests — a platform's First Amendment right against a player's right of publicity.[112] As evidenced above, the ad-hoc balancing test produces the

103. *See Rogers*, 875 F.2d at 1005.

104. *See Daniels*, 109 N.E.3d at 394.

105. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (en banc).

106. *See Rogers*, 875 F.2d at 1005.

107. *See id.*

108. *See id.* at 1006–07 (Griesa, J., concurring) ("[T]his unique case would seem to be an inappropriate vehicle for fashioning a general rule of the kind announced by the majority.").

109. Georgescu, *supra* note 62, at 940–41.

110. *Id. But see* David G. Roberts, *The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got It Wrong*, 58 CASE W. RESERVE L. REV. 223, 229 (2007) (criticizing the balancing test).

111. *See* Patrick M. McFadden, *The Balancing* Test, 29 B.C.L. Rev. 585, 622–23 (1988) ("If the balancing test is simpler than traditional legal reasoning, it might for that reason be preferred.").

112. *See id.* at 623 (specifying the balancing test is most effective when it "requires the balance of only a few interests").

most consistent results.

Lower courts that do not use a balancing test are misinterpreting *Zacchini*.[113] The Supreme Court refused to draw an exact line when sports media is protected by the First Amendment.[114] However, the Court recognized that the two competing interests — the First Amendment and publicity rights — must be weighed according to the social purpose behind them.[115]

However, a bright-line test is not necessary in the fantasy sports context.[116] Fantasy sports do not broadcast plays or players' actions like touchdown or homerun celebrations.[117] Fantasy sports differ significantly from the act in *Zacchini* because they do not pose a threat to the players' economic value of their *performance*, meaning that the use of a player's name for sports betting does not affect an athlete's ability to play his or her professional sport.[118] Unlike *Zacchini*, the use of athletes' names does not go to "the heart of [their] ability to earn a living as an entertainer," but is more like the "unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press."[119] In *Zacchini*, the value of the act was derived from the unique performance to a new audience.[120] In professional sports, the value of the performance is not linked to a new audience, but rather to an entire new performance, often to the same audience.[121] Professional athletes, by the very nature of their occupation, place themselves into the public domain.[122] Therefore, they are unable to seek compensation for the use of their name while simultaneously holding themselves out to be public

113. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977).

114. *Id.* at 574–75 (declining to draw a bright-line because it was clear the First Amendment does not allow for the broadcasting of an entire event without authorization).

115. *See id.* at 576. (citing Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 331 (1966)).

116. *See generally id.* (declining to construct a bright-line test); Daniels v. FanDuel, Inc., 109 N.E.3d 390 (Ind. 2018) (same).

117. Stark, *supra* note 10.

118. *See Zacchini*, 433 U.S. at 575–76; *see also Daniels*, 109 N.E.3d at 394 (holding that players' names and data do not lose "newsworthy value simply because [they are] . . . used in the context of a fantasy sports game").

119. *Zacchini*, 433 U.S. at 575–76.

120. *See id.*

121. *See* Shirley Wang, *Sports Complex: The Science Behind Fanatic Behavior*, ASS'N FOR PSYCHOL. SCI. (May 1, 2006), https://www.psychologicalscience.org/observer/sports-complex-the-science-behind-fanatic-behavior (noting that fans often identify with their sports team).

122. *See Zacchini*, 433 U.S. at 582 (Powell, J., dissenting) (emphasizing that the individual placed themselves in the public domain).

figures.[123] Lost profits and economic opportunity do not outweigh the First Amendment because freedom of speech is a core value of the United States, while the right of publicity is a predominately economic one.[124]

The different publicity rights tests each have advantages and disadvantages, but the ad-hoc balancing test presents the least number of flaws.[125] The predominant purpose test seeks to determine the subjective intent of the creator — a very confusing and arbitrary method of adjudicating these claims.[126] This test is inappropriate for publicity claims in the fantasy sports context because it could lead to inconsistent application in an already muddled inquiry due to "[t]he sufficiency of artistic transformative-ness [being] a qualitative valuation."[127]

Similarly, the transformative use test is unsuitable for the fantasy sports analysis.[128] This test also tries to look at the subjective intent of the creator because it only requires that significant transformation happen.[129] This approach will lead to inconsistent application and will not solve the uniformity problem of publicity rights adjudication.[130] The relatedness test's shortcomings do not solve the problems of publicity rights because the holding of each adjudication is often limited to its facts and therefore unfit for broad application.[131] Like the others, this test does not solve the problem of inconsistent application.[132]

Even if courts do not use the ad-hoc balancing test, players' claims may not survive using the other publicity rights tests.[133] A publicity right would

123. *See id.* (reasoning a public act broadcasted on a news channel did not entitle the individual to receive compensation).

124. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 818 (1996) (highlighting the government will only restrict free speech when "address[ing] extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech").

125. *See* Georgescu, *supra* note 62 (examining the four tests that emerged).

126. Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (en banc).

127. *See* Geoffrey F. Palachuk, Note, *Transformative Use Test Cannot Keep Pace with Evolving Arts*, 16 DENV. SPORTS & ENT. L.J. 233, 269 (2014) (arguing the test could lead to "conflicting and unpredictable results").

128. *See id.* at 275 (arguing the transformative test does not aid courts in determining publicity rights violations).

129. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 811 (Cal. 2001).

130. *See* Palachuk, *supra* note 127, at 263–64 (criticizing the test because it will show favoritism for individual rights over freedom of expression).

131. *See* Hart v. Elect. Arts, Inc., 717 F.3d 141, 157 (3d Cir. 2013) ("We are concerned that this test is a blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one's own identity.").

132. *Id.*

133. *See generally* Georgescu, *supra* note 62 (discussing the inconsistent application

not grant athletes the right to be compensated under the relatedness test because fantasy sports do not advertise using players' names and the use of their names is closely related to fantasy sports.[134] Adjudication under the transformative use test results in sports betting platforms being able to use player name and game statistics without compensation because they transform the data into a new and uncommon form.[135] The predominant use test is the only possible test that could provide an avenue for athletes because fantasy sports are predominately used for economic purpose.[136] However, a court may find that fantasy sports are predominantly using the data in an expressive and creative way by assigning points to different accomplishments during performances, allowing users to interact with the data in a new way.[137]

*c. The Right of Publicity Is an Economic One*

Originally a privacy right, the right of publicity has evolved into a predominantly economic right.[138] Courts have analyzed this right through a property lens as opposed to a privacy one.[139] Courts have also looked to other factors to satisfy the same goals as the right of publicity.[140] Players' high compensation satisfies the goal of a publicity right, meaning their economic interests are protected without implicating intellectual property rights.[141]

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due to the varying publicity rights tests).

134. *See* Rogers v. Grimaldi, 875 F.2d 994, 1005 (2d Cir. 1989) (baring use of a celebrity's name unless wholly unrelated to the work or as an advertisement).

135. *Id.*; Georgescu, *supra* note 62, at 931.

136. Daniels v. FanDuel, 109 N.E.3d 390, 396 (Ind. 2018).

137. *Id.*

138. *E.g.*, Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L. REV. 23, 26 (1999) ("The right of publicity was born out of the right of privacy, and later developed into a property right of sorts."). *But see* Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 455, 455 (Ohio 1976) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.").

139. *See, e.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 807 (Cal. 2001) ("What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame[.]").

140. *Id.*; *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) ("[P]rotection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.").

141. *The World's Highest-Paid Athletes*, FORBES, https://www.forbes.com/athletes/list/#tab:overall (last visited Feb. 18, 2020) (showing that Lebron James earned $89 million in 2019).

While daily fantasy sports provide more opportunity for betting platforms to gain revenue without paying players, this additional income is not enough to offset the players' large salaries.[142] Consumers will not be misled by advertisements because all players are included in fantasy sports, and therefore no one would believe that any one player was endorsing any specific brand or platform.[143] It is hard to believe that professional athletes will stop playing sports simply because they are not compensated for the use of their name in fantasy sports.

### *d. Indiana Takes the Lead*

Regardless of the test used, courts in the future are likely to follow the Indiana Supreme Court's decision because Indiana has one of the broadest publicity right statutes.[144] This makes Indiana an optimal forum for those seeking to vindicate their publicity rights.[145] Indiana has one of the broadest publicity right statutes because, unlike the states of Ohio and New York, it protects a person's signature, gestures, and mannerisms.[146] Additionally, Indiana allows the right to be enforced for a longer period of time.[147] Other states with narrower publicity right statutes will likely hold that the First Amendment prevails in the dispute.[148] Because a state with a broader

142. *See* Michael B. Greenberg, *Full-Court Press: Fantasy Sports, the Right of Publicity, and Professional Athletes' Interest in the Live Transmission of Their Statistical Performances*, 20 J. TECH. L. & POL'Y 129, 153 (2015) (suggesting that fantasy sports are similar to video games and the real-time data unfairly infringes on the proprietary rights of professional athletes because it "unjustly limits their ability to fully reap the benefits of their labors").

143. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 824 (8th Cir. 2007).

144. *See* Raij et al., *supra* note 8 (explaining that Indiana has one of the broadest publicity rights statues).

145. *See* Jeremy A. Wale, Note, *Adequate Protection of Professional Athletes' Publicity Rights: A Federal Statute Is the Only Answer*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 245, 251–52, 255–56 (2009) (cautioning that plaintiffs might forum shop to gain favorable publicity statutes).

146. *Compare* Ind. Code Ann. § 32-36-1-7 (2019), *with* Ohio Rev. Code Ann. § 2741.02 (2019) (protecting "individual persona"), *and* N.Y. Civ. Rights Law § 51 (McKinney 2019) (providing protection for name, portrait, picture, and voice).

147. *Compare* Ind. Code Ann. § 32-36-1-8 (granting a person a publicity right for a commercial purpose during his or her lifetime or one hundred years following the person's death, prohibiting the unauthorized use of such), *and* Ohio Rev. Code Ann. § 2741.02 (allowing a person to enforce the right during their lifetime plus sixty years), *with* N.Y. Civ. Rights Law § 51 (refusing to recognize a posthumous right of publicity).

148. *See* Daniel Gervais & Martin L. Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP., MEDIA, & ENT. L.J. 181, 182 (2014) (citing J. Thomas McCarthy, RIGHTS OF PUBLICITY AND PRIVACY § 1:25 (2d ed. 2014)) ("[T]en states have statutes which, while some are labeled 'privacy'

publicity rights statute has defeated player's publicity claims, one of the main arguments advocating for a federal publicity right — prevention of forum shopping — must also fail because if the most lenient state does not allow success on these claims, then athletes in stricter states will also not prevail.[149] While not binding on other courts, the *Daniels* decision will likely guide other courts that need to resolve similar claims because other publicity statutes have newsworthy exceptions.[150] While the First Amendment may not prevail on every occasion involving publicity rights, in the context of fantasy sports and professional athletes, it will allow betting platforms to use player names and statistics without compensation.[151]

## IV. PLAY-BY-PLAY DATA IS THE SOLUTION

The right to publicity has been ambiguous since its inception, partly due to its state-specific inquiry and because of the courts' inconsistent application of different tests.[152] The Supreme Court has yet to weigh in on publicity rights in fantasy sports, but the states are not left without guidance.[153] The best way to provide a uniform framework is for courts to adopt the ad-hoc balancing test.[154] This test provides the simplest analysis, therefore making it the optimal choice to ensure consistency.[155] The ad-hoc

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statutes, are worded in such a way that most aspects of the right of publicity are embodied in those statutes.").

149. *See* Daniels v. FanDuel, Inc., 109 N.E.3d 390, 397–98 (Ind. 2018) (interpreting Indiana's publicity statute's newsworthy exemption broadly); *see also* Zachary Zagger, *7th Circuit Avoids DFS Legality, Ends Publicity Rights Suit*, LAW360 (Nov. 29, 2018, 9:13 PM), https://www.law360.com/articles/1106460/7th-circ-avoids-dfs-legality-ends-publicity-rights-suit ("[P]utting an end to a proposed class action . . . to stop DraftKings and FanDuel from using their names, likenesses and statistics without permission.").

150. Christina Costa & Jonathan Polak, *Indiana Supreme Court: No Right to Publicity in Fantasy Sports*, TAFT (Oct. 26, 2018), https://www.taftlaw.com/news-events/law-bulletins/indiana-supreme-court-no-right-to-publicity-in-fantasy-sports (speculating this decision may not be limited to Indiana and "is likely to be instructive, guiding and potentially dispositive.").

151. *See Daniels*, 109 N.E. at 398 (allowing an exception to publicity rights for fantasy sports using athletes' "names, pictures and statistics"). *But see* Ryan Martin, *Indiana DFS Ruling Sets Stage for Sports Betting Right of Publicity Disputes*, SPORTTECHIE (Jan. 16, 2019), https://www.sporttechie.com/indiana-fantasy-sports-ruling-publicity-rights-betting/ (conjecturing the *Daniels* decision was narrow).

152. *See* McFadden, *supra* note 111, at 586 (highlighting the balancing tests simplicity).

153. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 570 (1977) (finding a right of publicity violation using a balancing test when a news station broadcasted an entire performance).

154. *But see, e.g.*, Georgescu, *supra* note 62, at 946 (suggesting a blend of the ad-hoc balancing test and the transformative use tests).

155. *See* McFadden, *supra* note 111, at 587 (praising the ad-hoc balancing test for its

balancing test, however, does not help athletes in the fantasy sports context because athletes are in the public domain.[156] The First Amendment trumps any potential lost profits because of its constitutional roots. Freedom of speech and expression are core values of the United States, and when weighed against publicity rights, these principles override the intellectual property rights of athletes.[157]

Athletes are not without any recourse, but to enforce their publicity rights, they need the support of their leagues because the leagues must collectively bargain for compensation for use of athletes' names. On the surface, the leagues seem to be behind their players.[158] However, not all leagues are in agreement and willing to negotiate on behalf of other leagues' players.[159] The leagues need to form a unified front if they wish to fight for this right for their players. To protect the athletes' interests, the leagues should try to negotiate with the sports platforms during the upcoming 2021 contract renegotiations.[160] Platforms like DraftKings and FanDuel have an incentive to contract with players' unions because these sites could then use a player's name and likeness for promotional purposes.[161]

While it may seem that the players are at a disadvantage, they may be able

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simplicity).

156. *See* Daniels v. FanDuel, 109 N.E.3d 390, 392 (Ind. 2018).

157. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc, 21 P.3d 797, 810 (Cal. 2001) (describing when a First Amendment protection is warranted); *see also* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996) (finding the balance between First Amendment protection of free expression and the intellectual property rights of the artist).

158. *See* Michael A. Rueda, *Players Associations File Amicus Curiae Brief with Indiana Supreme Court in FanDuel/DraftKings Litigation*, WITHERSWORLDWIDE, (May 18, 2018), https://www.withersworldwide.com/en-gb/insight/players-associations-file-amicus-curiae-brief-with-indiana-supreme-court-in-fanduel-draftkings-litigation (noting multiple leagues filed amicus curie briefs in the Daniels v. FanDuel case).

159. *See* John Brennan, *What Is the Pro Athlete's Place in This New Era of U.S. Sports Betting Expansion?*, USBETS (Nov. 30, 2018), https://www.usbets.com/pro-athletes-place-sports-betting-expansion/ (recounting the poor communication between the various professional sports leagues).

160. *See* Thomas Dunn, *NFL Players Need to Gain Leverage in Contract Negotiations*, VILL. U. JEFFREY S. MOORAD CTR. STUDY SPORTS L., https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/sls_blog/2018/nfl-players-need-to-gain-leverage-in-contract-negotiations.html (last visited Feb. 18, 2020) (encouraging the NFL Players Association to negotiation a financially secure contract).

161. Gregory Pun & Michael A. Rueda, *Fantasy Sports and Publicity Rights: The Balancing Act as Athlete Unions Seek Compensation for Use of Name and Likeness*, WITHERSWORLDWIDE (June 7, 2018), https://www.withersworldwide.com/en-gb/insight/fantasy-sports-and-publicity-rights-the-balancing-act-as-athlete-unions-seek-compensation-for-use-of-name-and-likeness.

to gain leverage by tracking their data during games and practices and then selling it to the fantasy sports platforms.[162] This practice data, unlike player names and game statistics, is not in the public domain, and therefore the First Amendment will not allow the sports betting platforms to use it without compensation. Some leagues, like the NHL, have already partnered with casinos to use player data in real time.[163] Other leagues could follow the NHL's example to incentivize sports betting platforms to contract with their players' association.[164] Sports platforms want this data because it will allow the platforms to update odds for more accurate in-game betting.[165] While some players may have privacy concerns about selling their data, athletes can negotiate for reassurance that this information will only be used to update odds, and will not become available for purchase by third parties or the general public.[166] Tracking this data can also be very beneficial to the professional athletes by helping to improve their own performances.[167] This information will allow coaches and trainers to tailor drills and practices to specific areas of the body and skills, while minimizing an athlete's chance of injury during both practices and games.[168] While selling practice data may not be the only solution to gaining bargaining power, some NFL players are already doing so.[169]

## V. CONCLUSION

The legalization of sports betting heightens an athlete's interest in protecting the unauthorized use of his name, likeness, image, and statistics.

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162. Matt Rybaltowski, *NHL's Historic Deal with MGM Resorts Completes Gary Bettman's U-Turn on Sports Betting*, FORBES (Oct. 29, 2018, 5:53 PM), https://www.forbes.com/sites/mattrybaltowski/2018/10/29/nhls-historic-deal-with-mgm-resorts-completes-gary-bettmans-u-turn-on-sports-betting/#25a8edb85aca.

163. *See, e.g.*, *id.* (highlighting the partnership between MGM and the NHL due to the NHL's "state-of-the-art tracking system").

164. *See id.*

165. *But see id.* (disclosing the NHL's technology was developed for broadcasting purposes, and not for in-game betting reasons).

166. *See* Dave Issac, *Flyers Don't Mind NHL's Sports Betting Partnership with One Possible Exception*, COURIER POST (Oct. 30, 2018, 4:54 PM), https://www.courierpostonline.com/story/sports/nhl/flyers/2018/10/30/flyers-ok-sports-betting-partnership-one-possible-exception/1824114002/ (highlighting the NHL wants to use this technology to track data and sell it to MGM Resorts).

167. Paul Steinbach, *Tracking Technology Revolutionizes Athlete Training*, ATHLETIC BUS. (Sept. 2013), https://www.athleticbusiness.com/equipment/tracking-technology-revolutionizes-athlete-training.html.

168. *See id.*

169. Mark Van Duesen, *Empowering Players with Data Ownership*, WHOOP (Apr. 28, 2017), https://www.whoop.com/the-locker/empowering-players-with-data-ownership/.

With sports betting potentially legal in all states, there are unprecedented economic opportunities. The First Amendment overrides an athlete's publicity right, regardless of a player's lost economic opportunities because the information is in the public domain and professional athletes already earn high salaries. Therefore, sports betting platforms do not have to compensate professional athletes for use of their name and statistics.

Players can gain leverage by offering to track game and practice data of each athlete for later use by the sports platforms to update the odds for in-game betting. Without help from their leagues, professional athletes do not have much leverage in these negotiations.

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