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THE FUTURE IS NOW: ROBOTS AS SURGEONS

THE ADOPTION OF SURGICAL SAFETY STANDARDS TO ROBOTIC SURGERY

Kanika Kalra*

Abstract: In this era of ever-expanding and an all-pervasive existence of technology, newer innovations and Artificial Intelligence (AI) are shaking the established global legal systems from their roots by bringing in novel challenges and complexities. One of the most controversial questions in this area pertains to accountability and determination of liability – how can a machine be held responsible/accountable and more importantly, how can a machine be sanctioned for its actions, especially where machine learning makes it possible for machines to take decisions itself? Artificial Intelligence has, amongst other fields, also entered the domain of medicine, where it poses massive legal challenges, especially in the area of surgery. As much as it aids both patients and doctors, it is difficult to determine liability and accountability of robots as surgeons, especially in cases where surgery results in fatality or great physical, emotional and/or psychological harm – should the doctor be responsible or the manufacturer of the robot or both? If all stakeholders are liable in some or the other manner, how should the liability be distributed? Such questions get more complicated where machine learning leads to implementation of erratic decisions by the robot and causes adverse consequences. This kind of exponential growth in medical technology is not being met by the legal dynamism which is slowly exacerbating the pacing problem and the gap is gradually widening. Before human dependence on robotics increases, it is essential for the legal framework to address such complexities and concerns. In this paper, I aim to address issues of regulation, accountability and liability that engulf the area of surgery and Artificial Intelligence along with recommending solutions to the pacing problem i.e. how the same can be resolved in the area of medicine and surgery.

Keywords: Autonomous Robotic Surgeries; Surgical Safety Standards; Liability and Accountability; Medical Malpractice; Product/ Device Legislation

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INTRODUCTION

Imagine a situation where a patient is being operated upon by an autonomous robot, where the patient consented to the robot being the surgeon in light of its accuracy, dexterity and minimally invasive surgical technique leading to faster recovery. In the middle of the surgery, complications arise and the robotic surgeon, based on its training, past performances, and statistics, decides to pursue an approach which is contrary to how the experienced human surgeon wants to approach the surgery. Should the robot be allowed to proceed with as it deems fit or should the human surgeon's approach be superseded as eventually the latter will be held accountable? The answer to this question remains undetermined because like many other areas of artificial intelligence and robotics, the area of robotic surgery too remains unregulated. Starting from the question of which of the contrarian approaches ought to be followed, to the question of final responsibility of the decisions in case of medical negligence by the robotic surgeon, there are no answers to the question of accountability and liability of a robotic surgeon. Luckily, there is still some time before the world sees autonomous robotic surgeons, however, the same is not very far.

Over the years, there has been a rapid advancement in technology, especially in the area of artificial intelligence and robotics. An analysis of the history of technology shows that technological change is exponential, contrary to the common-sense 'intuitive linear' view.[1] So we won't experience 100 years of progress in the 21st century – it will be more like 20,000 years of progress.[2] This revolution is not limited to any one area. Rather, it extends to all arenas of our life including healthcare and medicine, where revolutionary technologies are impacting surgical practices, such as the Smart Tissue Anastomosis Robot (STAR)[3] or the da Vinci robotic system, a robot-assisted surgery system which enables surgeons to undertake the most intricate of operations with very high dexterity.[4] Robotic surgeries are therefore opening up new avenues in the surgical space. With their dexterity, accuracy and precision, robotic surgeons are able to perform better than human experts in the field and are often trained to perform some monotonous yet extremely delicate tasks themselves. Innovators have therefore been able to experiment handing human lives in the hands of robots, assuring efficiency and effectiveness in treatments, recovery, and involvement in the healthcare system. These innovations have raised many legal and ethical challenges such as how the industry should be governed and who should be liable, which this paper attempts to address. Increasing use of robotic surgery for common surgical procedures with limited evidence and unclear clinical benefits is raising several concerns.

Surgeons perform the same functions as pharmaceuticals do, except those surgeons operate on the individual physically and directly. Surgery hence is more invasive in comparison to medication. Agreeing with scholars, [5] it is my argument that there should be internationally

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[1] Kurzweil R. (2004) *The Law of Accelerating Returns*. In: Teuscher C. (eds) *Alan Turing: Life and Legacy of a Great Thinker.* Springer, Berlin, Heidelberg. https://doi.org/10.1007/978-3-662-05642-4_16 .

[2] *Id.*

[3] Simon Leonard, Kyle L Wu, Yonjae Kim, Axel Krieger, Peter C W Kim, *Smart tissue anastomosis robot (STAR): a vision-guided robotics system for laparoscopic suturing*, 61(4) IEEE Trans Biomed Eng. 1305, (2014).

[4] Ashrafian H, Clancy O, Grover V, et al. *The Evolution of Robotic Surgery: Surgical and Anaesthetic Aspects.* 119 BJA i72, (2017).

[5] Damini Kunwar, *Robotic Surgeries Need Regulatory Attention*, The Regulatory Review (Jan. 2020) https://www.theregreview.org/2020/01/08/kunwar-robotic-surgeries-need-regulatory-attention/; Guang-Zhong Yang et.al. *Medical robotics—Regulatory, Ethical, and Legal Considerations For Increasing Levels of Autonomy*, Robots and Society (2017). http://robotics.tch.harvard.edu/publications/pdfs/yang2017medical.pdf

harmonized regulatory standards governing the space of robotic surgery, analogous to the standards adopted by regulatory agencies such as the US Food and Drug Administration (FDA) in the United States or the Central Drugs Standard Control Organisation[6] (CDSCO) in India, which require that the drug be safe, efficacious and of acceptable quality before it is approved for human consumption. Not only are these standards the need of the hour, it is also essential for such standards and certifications to be internationally harmonized, to ensure patient safety, which should be of utmost priority. The idea is that these standards should honour the principle of "*primum non nocere*,"[7] i.e., first, do no harm.

In this paper, I engage in the debates surrounding the potential of artificial intelligence and autonomous robotic surgery, focusing on the legal and ethical challenges that it poses, which can and should be addressed with the help of adequate regulatory standards. The first part of the paper discusses the evolution and need of robotic surgeons followed by where this technology can take us and what are the problems associated with it. The second part of the paper analyses the "pacing problem", i.e. how the traditional legal framework does not keep up with these technological advancements, and whether it would be reasonable to hold the robotic surgeons accountable in the same manner as human surgeons. This takes us to the third part of the paper where I provide some recommendations for developing and improving the legal framework regulating this field and incorporating the same in healthcare practice, to ensure safety and security in the modern-day robotic surgery.

I. THE NEED AND DEPENDENCY ON ROBOTIC SURGEONS

Robotic surgeons have successfully worked towards improved clinical outcomes. Being one of the most successful areas of robotics,[8] robotic surgeons have been embraced by the surgical fraternity in an unparalleled manner, becoming the new standard of care.[9]

The original intention of robotic surgery was to permit the conducting of a surgical procedure from a remote distance without touching the patient[10] i.e. be minimally invasive. However, with greater surgical precision, accuracy and safer operations, robotic surgeons have been appreciated so much that they have also been devised to perform delicate surgeries such as joint replacements[11] or pelvic surgeries, which when conducted in the traditional way, leaves the surgeons hurting in their shoulders and with a seized up back.[12] Robotic surgeons allow minimally invasive approaches such as laparoscopy and thoracoscopy, which leads to

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[6] The Central Drugs Standard Control Organisation (CDSCO) (Indian regulatory authority for pharmaceuticals and medical devices) https://cdsco.gov.in/opencms/opencms/en/Home/.

[7] Robert H. Shmerling, *First, Do No Harm*, HARVARD HEALTH BLOG (June 26, 2021). https://www.health.harvard.edu/blog/first-do-no-harm-201510138421

[8] Aleks Attanasio, Bruno Scaglioni, Elena De Momi, Paolo Fiorini, Pietro Valdastri, *Autonomy in surgical robotics*, STORM LAB UK (June 26, 2021). *https://www.stormlabuk.com/wp-content/uploads/2020/07/ARCAS2020_PREPRINT.pdf*

[9] Tim Lane, *A Short History of Robotic Surgery*, 100 ANNALS 5 (2018). https://publishing.rcseng.ac.uk/doi/citedby/10.1308/rcsann.supp1.5

[10] Satava, R. M. *Surgical Robotics: The Early Chronicles: A Personal Historical Perspective* 12 Surg. Laparosc. Endosc. Percutaneous Tech. 6 (2002).

[11] STRYKER: MAKO ROBOTIC ARM-ASSISTED SURGERY (https://www.stryker.com/us/en/portfolios/orthopaedics/joint-replacement/mako-robotic-arm-assisted-surgery.html); ZIMMER BIOMET: ROSA ROBOTIC TECHNOLOGY (https://www.zimmerbiomet.com/patients-caregivers/knee/robotics-technology.html#:~:text=ROSA%2C%20which%20stands%20for%20Robotic,knee%20implant%20just%20for%20you)

[12] Tim Adams, *The robot will see you now: could computers take over medicine entirely?*, The Observer, July 29, 2018.

enhanced outcomes. Today, many doctors are using robotic surgeons because, in addition to the accuracy, precision and dexterity, robotic surgeons offer improved visualisation, less post-operation wound complications and less disfigurement. In addition, patients too prefer the assistance of robotic surgeons because of the reduced wound access trauma and shorter hospital stay.[13]

Therefore, assistance through robotic surgeons qualifies for dual benefits, both to the human surgeon who is operating as well as the patient. It enables the surgeon to perform minimally invasive techniques, which is in the interest of the patient, and assuring speedy recovery through the robotic surgeons' assistance. Robotic surgeon's extended stainless-steel arm and allow the surgeon to perform hour long surgeries while being seated.[14] Robot assisted surgeries are therefore being adopted increasingly, by multiples surgical specialities.[15] This assistance through robotic surgeons is further valued during the current times, when the world is suffering from a pandemic. Robots as healthcare assistants have been able to perform various monotonous tasks such as drawing blood[16], checking vital signs, monitoring the patient's condition,[17] taking care of the patient's hygiene[18] or acting as disinfectors,[19] thereby allowing nurses to devote their time towards activities that require greater human attention. These robots have been designed to carry out such monotonous and repetitive tasks, and in so doing, they assist the nurses in performing basic functions and procedures, which otherwise would overwhelm them physically and mentally. This allows the nurses and other medical practitioners to invest their time and energy to deal with issues that require being more creative, offering more care and empathy to the patient and making better decisions. Further, especially in the situations like the one posed by COVID-19, where proximity with an infected patient is riskier than it has ever been, involvement of high-end robots is the best way to address issues of nursing the patients without threatening the life of human nurses and doctors. Robots have therefore helped put more human 'care' back to 'healthcare.'[20]

The care and assistance provided by robot surgeons is especially praised today, considering how the COVID-19 pandemic[21] has transformed our world and impacted it from all possible ends. The ongoing pandemic has exposed our frontline workers to many risks,

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[13] H Ashrafian, O Clancy, V Grover, A Darzi, *The Evolution of Robotic Surgery: Surgical and Anaesthetic Aspects,* 119 BJA i72 (2009),*https://doi.org/10.1093/bja/aex383*

[14] Alliance of Advanced Biomedical Engineering, *Robot Assisted Surgery* https://aabme.asme.org/posts/robot-assisted-surgery.

[15] Chen, IH.A., Ghazi, A., Sridhar, A, et al. Evolving robotic surgery training and improving patient safety, with the integration of novel technologies. World J Urol (2020). https://doi.org/10.1007/s00345-020-03467-7.

[16] National Institute of Biomedical Imaging and Bioengineering, *Robots designed to simplify blood draws* (2020) https://www.nibib.nih.gov/news-events/newsroom/robot-designed-simplify-blood-draws#:~:text=NIBIB%2Dsupported%20bioengineers%20have%20created,more%20time%20to%20treat%20patients.

[17] Maureen McFadden, *Robots To The Rescure: Helping Monitor Patients At Risk of Falls, Confusion*, 16 NEWS NOW WNDU (Sep 19, 2018, 11:21 PM), https://www.wndu.com/content/news/Robots-to-the-rescue-Helping-monitor-patients-at-risk-of-falls-confusion-493777071.html .

[18] Chih-Hung King, Tiffany L. Chen, Advait Jain, Charles C. Kemp, *Towards an Assistive Robot that Autonomously Performs Bed Baths for Patient Hygiene*, HEALTHCARE ROBOTICS, LABORATORY GEORGIA INSTITUTE OF TECHNOLOGY https://assets.newatlas.com/archive/iros10_auto_clean.pdf (2010).

[19] Rachel Lerman, *Robot cleaners are coming, this time to wipe up your coronavirus germs,* Washington Post (September 08, 2020). https://www.washingtonpost.com/technology/2020/09/08/robot-cleaners-surge-pandemic/

[20] The Medical Futurist, *From Surgeries To Keeping Company: The Place Of Robots In Healthcare* https://medicalfuturist.com/robotics-healthcare/.

[21] World Health Organisation, *Coronavirus disease (COVID-19) Pandemic*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019.

especially those who were in direct contact with the patients. The pandemic has also resulted into a halt in the availability of various medical services, for the protection of the medical practitioner as well as the patient. During the pandemic's peak, all but the emergency surgical interventions have been suspended due to the increased risks of virus transmission for patients and medical staff.[22] This has not only impacted the healthcare of the patients but also led to severe economic losses to various hospitals internationally.[23] The pandemic has therefore provoked the industry to adjust and renew the ways in which healthcare is administered. It has shown why change into a more technologically inclusive system is indispensable.

Technological advancements have been a good response to this adjustment where, with the integration of healthcare and technology, robots can act as a shield, physically distancing the doctor and the patient, thereby acting as a powerful tool to combat the omnipresent fear of pathogen contamination and maintain surgical volumes.[24] The need for these technological advancements is only bound to rise, be it to fight the ongoing HIV AIDS or COVID pandemic or the pandemics to come, as it is being observed that coronavirus is not our last pandemic.[25]

Another instance where robotic surgeons have been of extreme assistance is in remote and hostile environments such as battlefields, where, instead of exposing the human surgeons to a high-risk environment, the robots can be sent for making diagnoses, curing infections and performing surgeries.[26] Medical robotic systems were the brainchild of the United States Department of Defence's desire to decrease war casualties with the development of telerobotic surgery in the 1990s, operating in the 'master-slave' concept with the human surgeon being the master, whose manual movements were transmitted to end-effector (slave) instruments at a remote site.[27] There have been massive transformations and advancements in technology since then, however, this is another instance where surgical robots can and have performed crucial tasks while keeping the medical staff in a safer, uncontaminated environment. Robots and artificial intelligence not only assist surgeons and medical practitioners under ordinary circumstances, but they are also dextrous at mitigating infectious contamination and aiding patient management in the surgical environment during times of immense patient influx. Therefore, machine intelligence in terms of robotic surgeons is gaining special significance in healthcare, especially today, to combat the virus.[28]

Ethicists worry that we may become so reliant on, for instance, robots for difficult surgeries, that humans will start losing these life-saving skills and knowledge; or that we

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[22] Aleks Attanasio, Bruno Scaglioni, Elena De Momi, Paolo Fiorini, Pietro Valdastri, *Autonomy In Surgical Robotics, https://www.stormlabuk.com/wp-content/uploads/2020/07/ARCAS2020_PREPRINT.pdf*.

[23] Alan D. Kaye, Chikezie N. Okeagu, Alex D. Pham, Yarce A. Silva, Jpshua J. Hurley, Brett L. Arron, Noeen Sarfraz, G.E. Ghali, Jack W. Gamble, Hnery, Liu, Richard D. Urman, Elyse M. Cornett, *Economic Impact of COVID-19 Pandemic On Healthcare Facilities And Systems: International prespectives*, (2020) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7670225/#:~:text=International%20hospitals%20and%20healthcare%20facilities,of%20%2450.7%20billion%20per%20month.

[24] Zemmar, A., Lozano, A.M. & Nelson, B.J., *The rise of robots in surgical environments during COVID-19*. Nat Mach Intell 2**,** 566–572 (2020). https://www.nature.com/articles/s42256-020-00238-2

[25] Devi Sridhar, *Covid Won't Be The Last Pandemic. Will we be better prepared for the next one?*, THE GUARDIAN (Mar 24, 2021, 14:23), https://www.theguardian.com/commentisfree/2021/mar/24/covid-pandemic-prepared-investment-science

[26] Wells, A.C., Kjellman, M., Harper, S.J.F, et al. *Operating hurts: a study of EAES surgeons*. Surg Endosc 33**,**933–940 (2019). https://doi.org/10.1007/s00464-018-6574-5

[27] Prem N Kakar, Jyotirmoy Das, Preeti Mittal Roy and Vijaya Pant, *Robotic invasion of operation theatre and associated anaesthetic issues: A review*, 55(1) Indian J Anaesth. 18–25 (2011). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3057239/

[28] Zemmar, A., Lozano, A.M. & Nelson, B.J. *The rise of robots in surgical environments during COVID-19*. Nat Mach Intell 2**,** 566–572 (2020). https://doi.org/10.1038/s42256-020-00238-2

become so reliant on robots for basic, arduous labour that our economy would somehow be impacted and we would forget some of those techniques.[29] However, this objection does not stand against the general benefits that this technology has to offer, as it outweighs any losses. This argument is similar to arguments about our mathematical abilities being impacted with the advent of calculators or excel sheets. However, there has been no such impact on human abilities, despite such enhanced technologies. Similar arguments have been made about the human surgeons who may potentially forget the methods of performing crucial surgeries after training and delegating surgical tasks to the robotic surgeons. Similar to humans not lagging in their ability to make calculations, it is unclear why human surgeons would forget ways of performing something as artful as brain or heart surgery.[30] The trade-off undoubtedly lies in favour of the continual use and development of robotic assisted surgeries and medical aid. The argument therefore does not sustain.

II. EVOLUTION OF ROBOTICS IN HEALTHCARE AND THE "PACING" PROBLEM

Robot manufacturing has been in practice for a very long time, but they entered the realm of medicine only in the 1990s, addressing the need for technology that would support minimally invasive surgeries. The world saw its first robot in 1985, the Arthrobot, an orthopaedic surgical robot developed by Dr. James McEwen, which was capable of manipulating and positioning the patient's limb during the orthopaedic surgery on voice command by the surgeon.[31] With its functions, the robot made the surgery safer and of better quality, sparing the surgeon the job of manipulating the joint.[32] This was followed by Unimation Puma 200, an industrial robot, which was used by the Long Beach Memorial Medical Center in California to insert a probe for use in a brain biopsy using computed topography navigation.[33] The first robot that was approved by the US Food and Drug Administration (FDA) for clinical use was the Automated Endoscopic System for Optimal Positioning (AESOP), which was granted approval in 1994.[34] The robot was a voice controlled robotic arm for holding the endoscope, with adjustable positioning to ensure steady view to the operating field. This was followed by the creation of ZEUS in 1996, a complete robotic surgical system with seven degrees of freedom, tremor elimination and motion scaling.[35] This was also the robot which was used for the first 'long-distance' tele-surgical procedure, where the patient was undergoing laparoscopic cholecystectomy in Strasbourg while the doctor operating was located in New York.[36] Amongst all the surgical robots made so far, the most well-known

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[29] Patrick Lin, George Bekey, Keith Abney, *Robots in War: Issues of Risk and Ethics*, (2009). https://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1010&context=phil_fac

[30] *Id.*

[31] Olga Lechky, *World's first surgical robot in B.C.*, 21, No. 23, The Medical Post, The Maclean Hunter Newspaper for the Canadian Medical profession (1985). https://www.brianday.ca/imagez/1051_28738.pdf

[32] Smith, J.A., Jivraj, J., Wong, R, et al. *30 Years of Neurosurgical Robots: Review and Trends for Manipulators and Associated Navigational Systems*. Ann Biomed Eng 44**,** 836–846 (2016). https://doi.org/10.1007/s10439-015-1475-4

[33] Kwoh, Y. S., Hou, J., Jonckheere, E. A. & Hayati, S. *A Robot With Improved Absolute Positioning Accuracy For CT Guided Stereotactic Brain Surgery* 35 IEEE Trans. Biomed. Eng. 153 (1988).

[34] Nathan, C. O., Chakradeo, V., Malhotra, K., D'Agostino, H., & Patwardhan, R. *The Voice-Controlled Robotic Assist Scope Holder AESOP For The Endoscopic Approach To The Sella,* 16(3) SKULL BASE 123–131 (2006), https://doi.org/10.1055/s-2006-939679

[35] Ranev, D. & Teixeira, J., *History of computer-assisted surgery,* 100 Surg. Clin. North Am. 209–218, (2020).

[36] Marescaux, J. & Rubino, F. in Teleophthalmology (eds Yogesan, K, et al.) 261–265 (Springer, 2006); Lawrence Osborne *THE YEAR IN IDEAS: A TO Z*, New York Times (December 09, 2001). https://www.nytimes.com/2001/12/09/magazine/the-year-in-ideas-a-to-z-telesurgery.html

robot with ground-breaking evolution has been the FDA approved[37] da Vinci Xi and X Surgical systems by Intuitive Surgery,[38] a robot system offering precision, flexibility and control to perform many kinds of procedures across different surgical specialties ranging from cardiac surgery to head and neck surgery to gastric bypass and even urological surgery. Robotic surgeons are capable of performing technically challenging procedures.[39] These robots are not only limited to assisting surgeons in their surgeries or completing monotonous and repetitive tasks. They are also capable to diagnosing a patient's illness based on the symptoms and recommending the most suitable treatment plan.[40] This is done through the technique of machine learning. Machine learning is a statistical technique for fitting models to data and to 'learn' by training models with data.[41] The technique being at the core of most forms of AI, has been adopted in the healthcare system to make machines adept at precisely predicting what treatment protocols are likely to succeed based on various patient attributes and the treatment context.[42] The most recent robotic surgeons that have received FDA approval have been the Brainlab Loop-X Mobile Imaging robot and Cirq, a surgical robot.[43] The Brainlab Loop-X imaging robot, which can be controlled wirelessly with a touchscreen tablet, allows for flexible patient positioning and non-isocentric imaging which reduces the amount of radiation exposure and increases the variety of indications which can be treated.[44] Cirq, on the other hand, is a robotic alignment module, capable of fine tuning the alignment to a pre-planned trajectory and freeing up surgeons' hands, enabling them to focus on the patient's anatomy.[45]

Even though the advancements in robotic systems are relatively new, they are rapid, quick and require the legal community to respond. There are several other robotic surgeons and healthcare providers being developed for commercial availability, and while scalpel-wielding droids are a long way off, scientists are at work on devices that perform surgical tasks with minimal human oversight.[46] The legal and ethical complexities surrounding these

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[37] S.510 (k) premarket notification of intent to market application for The da Vinci Xi and X Surgical Systems (models IS4000 and IS4200) (March 31, 2020). https://www.accessdata.fda.gov/cdrh_docs/pdf18/K183086.pdf

[38] INTUITIVE SURGEON, https://www.intuitive.com/en-us/healthcare-professionals/surgeons?gclid=EAIaIQobChMIv7PY3ZOj8AIVEpSzCh1ETADDEAAYASAAEgK47_D_BwE (last accessed May 20, 2021).

[39] Troccaz, J., Dagnino, G. & Yang, G.-Z. *Frontiers of medical robotics: from concept to systems to clinical translation*. Annu. Rev. Biomed. Eng. 21, 193–218 (2019).

[40] Ahuja, Abhimanyu S. *The impact of artificial intelligence in medicine on the future role of the physician*. PeerJ vol. 7 e7702. 4 Oct. 2019, doi:10.7717/peerj.7702

[41] Thomas Davenport, Ravi Kalakota, *The potential for artificial intelligence in healthcare,* 6(2) FUTURE HEALTHCARE JOUNAL 94–98 (2019). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6616181/

[42] Lee SI, Celik S, Logsdon BA, Lundberg SM, Martins TJ, Oehler VG, Estey EH, Miller CP, Chien S, Dai J, Saxena A, Blau CA, Becker PS, *A machine learning approach to integrate big data for precision medicine in acute myeloid leukemia*, 9(1) NAT COMMUN 42 (2018); Susan Pinto, Stefano Quintarelli, Vincenzo Silani, *New Technologies and Amyotrophic Lateral Sclerosis- Which step forward rushed by the COVID-19 Pandemic?* 418 J Neurol Sci. (2020). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7403097/

[43] Brainlab, *Brainlab Loop-X Mobile Imaging Robot and Cirq Robotic Alignment Module for spine both receive FDA clearance,* (2021) https://www.brainlab.com/press-releases/brainlab-loop-x-mobile-imaging-robot-and-cirq-robotic-alignment-module-for-spine-receive-fda-clearance/#:~:text=Receive%20FDA%20clearance-,Brainlab%20Loop%2DX%20Mobile%20Imaging%20Robot%20and%20Cirq%20Robotic%20Alignment,Spine%20Both%20Receive%20FDA%20clearance&text=Chicago%2C%20February%2022%2C%202021%E2%80%94,%C2%AE%2C%20a%20robotic%20surgical%20system (last accessed May 15, 2021).

[44] Sam Brusco, *FDA OKs Brainlab's Loop-X Mobile Imaging Robot, Cirq Robotic Alignment,* ODT (February 23, 2021). https://www.odtmag.com/contents/view_breaking-news/2021-02-23/fda-oks-brainlabs-loop-x-mobile-imaging-robot-cirq-robotic-alignment-module/

[45] Brainlab, *supra* note 41.

[46] Sara Castellanos, *Autonomous Robots are coming to the Operating room,* THE WALL STREET JOURNAL (Sept 10, 2020 9:00 PM). https://www.wsj.com/articles/autonomous-robots-are-coming-to-the-operating-room-11599786000

developments have not been addressed so far, such as the question of liability, i.e. who would be held responsible in case of a medically negligent act of the robot, or in case of misdiagnosis by the robotic surgeon, which may cause harm to the patient.

Another probable situation that needs to be addressed by the legal system is, in case of clashes in opinions between the medical practitioner and the robotic surgeon, whose opinion prevails? This needs to be determined before we let robotic surgery be an ordinary practice in the world. Since there are multiple actors in bringing together one robotic surgeon, from the hardware engineer to the software developer, the producer/ manufacturer of the robot and the medical practitioner which helped in the machine learning process, there has to be clarity on the question of liability, something that the current tort law system is failing to address.[47]

Robotic surgeons are not humans, they lack consciousness and are ethically and morally asleep.[48] They function based on what they perceive over a certain period of time through machine learning.[49] This lag in the modification of law has led to the existence of the 'pacing problem', i.e. the temporal gap between technology and governance.[50] While the pace of technological development continues to accelerate, the pace of legal response has failed to keep up.[51] Law, being a dynamic tool is expected to develop faster to keep up with changing times and innovations in technology.[52] However, there are no regulations in place to govern and standardize the automation and robotics industry in healthcare and medicine. The current legal framework, that is purportedly managing and regulating these emerging technologies, is not growing as rapidly, fuelling concerns about a growing gap between the rate of technological change and management of that change through legal mechanisms.[53] The traditional legal tools are therefore being left behind by the emerging technologies. As Isaac Asimov said- "*It is change, continuing change, inevitable change, that is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be. . . .*",[54] it is essential for there to be additions and modifications to the current legal system to address the issues relating to certification and liability when it comes to robots as surgeons, beginning with incorporating internationally harmonized standards. Some potential problems if the law fails to keep up with the pace of the technology include, failure to impose precautions and restrictions to control the risks of new technologies, uncertainty in the application of the current legal framework to new technologies and the

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[47] Shane O'Sullivan, Nathalie Nevejans, Colin Allen, Andrew Blyth, Simon Leonard, Ugo Pagallo, Katharina Holzinger, Andreas Holzinger, Mohammed Imran Sajid, Hutan Ashrafian, *Legal, regulatory and ethical framework for development of standards in artificial intelligence (AI) and autonomous robotic surgery*, 15(1) INT J MED ROBOTICS COMPUTER ASSIST SURG., (2018). https://doi.org/10.1002/rcs.1968

[48] Wendell Wallach, Colin Allen, Stan Franklin, *Consciousness and Ethics: Artificially conscious moral agents*, 3(1) INETERNATIONAL JOURNAL OF MEDICAL CONSCIOUSNESS, 177-192 (2011).

[49] THOMAS DAVENPORT, RAVI KALAKOTA *supra* note 41.

[50] Braden R. Allenby, *The Growing Gap Between Emerging Technologies and the Legal-Ethical Oversight, The Pacing Problem*, 19-33 (Gary E. Marchant, Braden R. Allenby, Joseph R. Herkert) (2011).

[51] BRADEN R. ALLENBY, *supra* note 50.

[52] Suzie Miles, *Does the law need to develop faster to keep up with the changes in technology?,* ASHFORDS (November 09, 2015) https://www.ashfords.co.uk/news-and-media/general/does-the-law-need-to-develop-faster-to-keep-up-with-changes-in-technology ; Hans Kelsen, *A "Dynamic" Theory of Natural Law*, 16 LA. L. REV. (1956) https://digitalcommons.law.lsu.edu/lalrev/vol16/iss4/2

[53] Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, U. Ill. J. Law Tech. & Pol'y 239-285 (2007).

[54] Isaac Asimov, *Asimov on Science Fiction*.

possibility of the existing legal framework to under or over-regulate the new technologies, or the technology making the existing legal framework obsolete.[55]

III. SHOULD THE ROBOTIC SURGEON BE MADE PERSONALLY LIABLE?

The "pacing" problem requires adoption of an adequate legal framework to regulate robot surgeries, the manner in which they are adapted and executed and the identification of who would be held liable in case of any negligence leading to damage to the patient. To respond to this question, it is essential to understand the status of robots in our society and in the medical industry. Should they be given the status of medical devices or should they be granted "personhood" thereby being made personally liable for their actions? Some argue that robots should be granted 'personhood' and therefore, be accorded with the same rights and liabilities as humans, including making them liable in case of any damage due to any action or inaction of the robot.[56]

The European Union is another part of the world making strides in developing robotic surgeons with the intention of delivering superhuman performance.[57] The most recent robotic surgeon, granted approval beginning in January 2021 is Functionally Accurate Robotic Surgery (FAROS), which, as the name suggests, aims at improving functional accuracy through embedding physical intelligence in the surgical robotics.[58] FAROS explores venues to efficiently embody surgeon-like autonomous behaviour at different levels of granularity.[59] While autonomous robots with human-like all-encompassing capabilities are still decades away, European lawmakers, legal experts and manufacturers are already locked in a high-stakes debate about their legal status: whether it's these machines or human beings who should bear ultimate responsibility for their actions.[60] In 2017, the European Parliament in its report[61] recommended creating a specific legal status of 'electronic personality' for sophisticated autonomous robots. This status could allow robots to make good any damage that they may cause as an electric personality, insuring them individually and holding them liable for the damages if they go rogue and start hurting people or damaging property.[62]

While such recommendations of granting robots a 'legal personality' raises its own set of complexities and concerns as is also highlighted by many other legal AI experts,[63] like the questions about its ethical and normative implications as there are not just physical or monetary harms but also psychological harms associated with surgical errors, the recommendation of

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[55] BRADEN R. ALLENBY, *Supra* note 50.

[56] Alex Hern, *Give robots "Personhood" states, EU Committee argues*, THE GUARDIAN (Jan 12, 2017, 15:52 GMT) https://www.theguardian.com/technology/2017/jan/12/give-robots-personhood-status-eu-committee-argues

[57] CORDIS, *Functionally Accurate Robotic Surgery* https://cordis.europa.eu/project/id/101016985 (last accessed on May 20, 2021).

[58] *Id.*

[59] *Id.*

[60] Janonsch Delcker, *Europe divided over robot 'personhood'*, POLITICO (April 11, 2018). https://www.politico.eu/article/europe-divided-over-robot-ai-artificial-intelligence-personhood/

[61] European Parliament Report with recommendations to the Commission on Civil Law Rules on Robotics A8-0005/2017 Para. 59, (f) (Jan 27, 2017) https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html?redirect (last accessed on May 02, 2021).

[62] *Id.*

[63] "By adopting legal personhood, we are going to erase the responsibility of manufacturers," said Nathalie Navejans, a French law professor at the Université d'Artois, who was the driving force behind the letter. Noel Sharkey, emeritus professor of artificial intelligence and robotics at the University of Sheffield, who also signed on, added that by seeking legal personhood for robots, manufacturers were merely trying to absolve themselves of responsibility for the actions of their machines.

individually insuring each robot such that they would not be expected to be morally conscious of their acts is something I agree with. Robots cannot stand analogous to humans capable of getting married or benefitting from human rights. Restricting them to be legally capable of making good for any damage they cause is reasonable because that liability would fall to other actors. As AI experts argue, granting legal personality to robots would act as a safe harbour for the manufacturers, absolving them of the actions of their machines. Simply insuring robots individually would be as good as medical devices, as the FDA treats robotic surgeons (example- AESOP[64]), still keeping them devoid of all rights and responsibilities.

Arguing for robotic rights has become a subject-matter of serious policy debates, however, many are skeptical to this thought, primarily because robots do not possess some of the qualities that are associated with human beings such as freedom of will, intentionality, self-consciousness, moral agency, or a sense of personal identity.[65] Granting rights and duties to a robotic surgeon would therefore not satisfy the question of liability in case of harm caused due to negligence. A robot can never be held culpable and subsequently punished for the same due to the notion of "culpability" which is dogmatically connected with the notions of free will and conscience, possession of which are essential for attribution of guilt. One may argue that there are other unnatural things that have been granted 'personhood' the same way one argues for robots, such as companies or even natural water bodies, which are considered to be separate legal entities.[66] However, in all these cases, there is always a natural person existing behind this legal person and the veil can always be lifted. This would not be the case if a robot surgeon is granted personhood. This argument was also upheld by the European Economic and Social Committee on AI of 31 May 2017 which considers "the comparison with the limited liability of companies is misplaced, because in that case a natural person is always ultimately responsible."[67] Therefore, granting robotic surgeons a legal personality would not resolve the issues relating to liability. Rather it would cause further damage by giving unreasonable immunity to the manufacturer, distributor, owner and operator in the event of damage caused by the robot surgeons.

Considering the benefits, a robot surgeon has to offer, be it from carrying out monotonous tasks, to diagnosing illnesses, to helping surgeons perform surgeries with utmost precision and in a minimally invasive manner, thereby assuring better performance and faster recovery of the patient, the intention is to continue with robotic surgeons while assuring a balance is maintained with respect to questions of accountability and liability between the various stakeholders and players involved in implementing the robot-assisted surgery. Hence it is reasonable to expect the robot to be treated as any other medical device for the purpose of assisting the surgeon, by either working autonomously or on the directions of the robotic surgeon. Robotic surgeons as medical devices should only be launched for medical use only after they meet the standards which are in compliance with assuring safety, efficacy and use of high quality medical devices. Further, even if personhood is granted to a robot, the veil of juristic identity should allowed to be lifted so that a patient who is wronged can claim adequate

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[64] NATHAN, *supra* note 34.

[65] World Commission on the Ethics of Scientific Knowledge and Technology, *Report of COMEST on robotics ethics 2017* https://unesdoc.unesco.org/ark:/48223/pf0000253952; Laura Voss, *More than Machines?: Attribution of (In)Animacy to Robot Technology* 145 (2021).

[66] Muhammad Waqas, Zahoor Rehman, *Separate legal entity of Corporation: the Corporate Veil*, 3(1) INTERNATIONAL JOURNAL OF SOCIAL SCIENCES AND MANAGEMENT 1-4, (2016).

[67] Office of Journal of European Union, *Opinion of the European Economic and Social Committee on 'Artificial intelligence — The consequences of artificial intelligence on the (digital) single market, production, consumption, employment and society'* OJ C 288, 31.8.2017, p. 1–9.

and reasonable damages for its losses even from an operator like hospital or doctor can be held liable for serious mishaps which causes physical, emotional and even psychological harms.

IV. THE NEED FOR AGILE AND COMPREHENSIVE GOVERNANCE FOR AI AND ROBOTICS IN THE MEDICAL INDUSTRY

The rapid developments of robotic technologies in the last decades have naturally fostered the use of robotic devices for medicine and health, e.g., for surgery, diagnosis, rehabilitation, prosthetics, and beyond.[68] These developments have given rise to various legal and ethical considerations where the current traditional regulations have proven to be insufficient. Be it issues surrounding the governance and liability of self-learning robotic surgeons or the question of accountability, liability and culpability, the current legal framework has not been able to resolve these complexities within its domain. Within their scope, which allows a doctor to perform live surgery from New York on a patient situated in Strasbourg,[69] emphasizes the need for appropriately tailored regulatory measures that are internationally harmonized, laying down the safety regulations before these robotic surgeons are launched for use on human patients. These standards are also required to answer the question of superiority between the human medical expert, whose opinions are grounded on experience and the robotic surgeon, who works on machine learning, basing all its actions and decisions on statistics collected from previous surgeries. This is essential in cases of conflict of opinion between the human surgeon and robotic surgeon. Further, the question of accountability and liability, which is extremely crucial in cases of robotic surgeons also needs to be effectively addressed under the regulatory provisions so that the manufacturers of these robotic surgeons do not use these machines as a shield to evade liability and the liability can be imposed in a balanced an just manner. However, with the cumbersome procedural and bureaucratic hindrances, it is rather likely that by the time a regulatory system does somehow manages to place new regulations for an emerging technology, they will likely be obsolete by the time the ink dries on the enactment, thereby further aggravating the 'pacing problem' instead of resolving it.[70] The need, hence, is for a method that is more flexible, agile, holistic, reflexive and inclusive.[71]

This method begins with setting up regulatory bodies on domestic/ regional and international levels, with members including experts from the medical and technical field, ethicists, lawyers and legislators. The sole objective of these regulatory bodies would be to regulate the involvement of AI and robotics in the medical industry, both autonomous and for assistance, by introducing periodical guidelines that continuously modify and address the safety, quality and efficacy needs of these robotic surgeons, similar to the FDA's standards for pharmaceuticals.[72] These bodies would be required to carry out continuous modifications in the guidelines as per the changing technology in order to address the successfully address pacing problem which essentially requires them be instilled with dynamism so that they can effectively and expeditiously respond of rapid technological changes. These guidelines can be

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[68] Shane O'Sullivan, Nathalie Nevejans, Colin Allen, Andrew Blyth, Simon Leonard, Ugo Pagallo, Katharina Holzinger, Andreas Holzinger, Mohammed Imran Sajid, Hutan Ashrafian, *Legal, regulatory and ethical framework for development of standards in artificial intelligence (AI) and autonomous robotic surgery*, 15(1) INTERNATIONAL JOURNAL OF MEDICAL ROBOTICS AND COMPUTER ASSISTED SURGERY (2018). https://doi.org/10.1002/rcs.1968

[69] *supra* note 36.

[70] Wendell Wallach, Gary Marchant (2019), *Toward the Agile and Comprehensive International Governance of AI and Robotics*, 107 PROCEEDINGS OF THE IEEE (2019). https://ieeexplore.ieee.org/document/8662741/authors#authors

[71] *Id.*

[72] *Supra.*

introduced as "soft law" into the system and once they have been tested by governments and judiciary, they can be incorporated in the traditional legal framework.[73] For example, the Future of Life Institute promulgated its Asilomar principles as a soft law tool for AI governance, but now the State of California has adopted those principles into its statutory law.[74]

These guidelines should incorporate standards that demonstrate the robotic surgeon's proficiency and safety in performing its claimed tasks. This can be determined based on a competency-based assessment, developed by this regulatory body, honouring the principle of "above all, do no harm". Analogous to clinical trials for pharmaceuticals, the competency-based assessment should be gleaned from the robotic surgeon's performance in virtual reality simulator systems,[75] where they can be trained and examined under different scenarios. The use of preliminary lab training in robotic skills is a good strategy for the rapid acquisition of further, standardized robotic skills.[76] These virtual reality simulators would also help pass other hurdles such as high costs, lack of availability of the surgical robot[77] and would allow approvals in different domestic jurisdictions thus allowing standardization of regulatory standards.

Further, in order to ensure adequate accountability for the steps pursued by the robotic surgeon, there needs to be a "black box," one similar to that on an airplane,[78] can be adopted which would record all the procedures undertaken by the robot along with the reasons and justifications for the same. This recording system must be installed in the medical device at the time of building the system. The intention behind the installation of this "black box" is to provide evidence and data that will assist in failure analysis[79] and identify dysfunctions[80] by learning the system's inputs, internal state and outputs.[81] A similar solution was proposed in a different context by Decker, [82] as he tries to keep track of the modifications of the robotics system related to the robot's learning of an algorithm.[83] This black box recorder would also be an effective tool for the question of accountability in legal disputes.[84] Once the robot passes these tests, and the regulatory body is confident about the robotic surgeon's safety, efficacy and quality, it should be allowed to be put to use, either for autonomous procedures or to assist human surgeons. Moreover, in the interest of further technological development and for patients to be able to make an informed decision while opting for robotic surgeons, the guidelines must mandate honest publication of the data produced during the competency-based assessment through the virtual reality simulators and during actual surgeries. In addition to

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[73] *Supra* note 70.
[74] ACR-215 23 Asilomar AI Principles. (2017-2018)**,** Assembly Current Resolution No. 215, Chapter 206 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180ACR215
[75] The virtual simulator are being developed by the Italian BBZ srl that is currently commercialising Xron, a novel training system for robotic surgery that runs on common hardware platforms.
[76] Mangano A, Gheza F, Giulianotti PC. *Virtual Reality Simulator Systems in Robotic Surgical Training*. Surg Technol Int. 2018 Jun 1;32:19-23. PMID: 29689588.
[77] *Id.*
[78] George Wafula, *What is in a plane's black box?,* BBC NEWS (March 15, 2019). https://www.bbc.com/news/av/world-africa-47591211
[79] *Supra* note 68.
[80] Cooper MA, Ibrahim A, Lyu H, et al. *Underreporting of robotic surgery complications*. 37(2) J HEALTHC QUAL (2015).
[81] *Supra* note 68.
[82] Decker M., *Responsible innovation for adaptive robots.,* PISA UNIVERSITY PRESS 65-86 (2014).
[83] *Supra* note 68.
[84] *Supra* note 82 pp: 84.

patient safety, this would also allow insurance companies to understand what to include or not to include in their health coverage of patients undergoing surgery performed by robot surgeons.

Despite the permit to function independently, the guidelines must mandate the presence of a licensed and board certified surgeon in the operating room at all times, even if the robot is functioning autonomously. This is necessary in the interest of the patient, which should be of utmost priority. Look at this as a surgical parallel to autonomously driven vehicles. In this example, a human remains in the 'driving seat' as a 'doctor-in-the-loop' thereby safeguarding patients undergoing operations that are supported by surgical machines with autonomous capabilities.[85] This should not only be seen as a back-up option but also as an ethical obligation towards the patients. In case the robotic surgeon acts in an incorrect manner or against the understanding of the licensed surgeon in-charge or in case of any technical failures, instead of aborting the surgery altogether, the human surgeon must be obligated to step in and take charge because providing best medical care to the patient is top priority. Converting to another surgical modality would not only be in the best interest of the patient, but it is rather also an ethical obligation that the human surgeon is bound to fulfil in such cases. Thus, this alternative recourse must be adopted through the guidelines. Further, the guidelines must clearly and strictly draw a hierarchy amongst the robotic and human surgeons. An expert human surgeon must always be ranked above the robotic surgeon and a clause in this regard must necessarily be incorporated in these guidelines. It is further essential that a patient is apprised of such information pertaining to the surgery and of the possible complications that can arise so that the consent obtained from the patient to undergo surgery is sufficiently informed and so that the patient is empowered to adopt an effective recourse in case he feels that he has been harmed. Such regulatory determinations also further make it easier to make resolve claims where a harmed patient seeks damages.

In addition to the presence of the medical practitioner, there must also be present an industry representative in the hospital employing robotic surgeons, which can look into the machine in case of technical difficulties, troubleshoot the hardware, software and patient interface system. This industry representative must not necessarily be trained in terms of his/her surgical skills as he/she is onsite for equipment support and not operative care, thus not being analogous to the human surgeon. The presence of an actual human surgeon and industry representative during the surgery would also emphasize the healthcare provider's culture of safety. The guidelines must also mandate the criteria based on which cases can be referred for robotic surgery, keeping in mind the object of maximizing patient outcome and minimising the chances of preventable complications.

Further, partially agreeing with the European Parliament Report,[86] all robotic surgeons must be independently insured for the liability of acts/omissions committed by them, which can be tracked through the black box recording system, accounting for all the acts of the robotic surgeon. While on the one hand, this insurance and black box recording system would avoid blame shifting or the entire liability falling on one of the actors, which may lead to discouraging innovation in the medical industry, it would not leave the victim of this negligence empty handed as the insurance company would cover the damages. This insurance must be seen as analogous to medical malpractice insurance,[87] a specialized type of professional liability insurance that covers physician liability arising from disputed services that result in a patient's

[85] *Supra* note 68.
[86] *Supra* note 61.
[87] *Understanding medical malpractice insurance*, INSURANCE INFORMATION INSTITUTE, https://www.iii.org/article/understanding-medical-malpractice-insurance (last accessed June 03, 2021).

injury or death. Therefore, all robotic surgeons should be independently insured with equal contributions from all actors in the making of the machine, which would cover the damages, if and when necessary.

Finally, all members of the medical community who are availing themselves of the assistance of these robotic surgeons should undergo compulsory mentorship programs that should be supported by medical education institutions. This mentorship program could be in the form of certificate programs or fellowships or any other novel educational methods, which would train these medical experts on how to operate the robotic surgeons and assure safer outcomes. This would also assist in building patient trust and foster a culture of safety by building a supervised regulatory structure.

CONCLUSION

AI, robotics, in healthcare and medicine are integrating at an exponential rate, raising various questions about accountability and liability, where the traditional legal standards and doctrines are proving to be insufficient. These medical innovations are unprecedented, and they demand innovative solutions. Not only do these robotic surgeons have a significant impact on surgical practice, they are also challenging the legal regulatory framework and the ethics of medicine and health care.[88] Therefore in this paper I have identified a need for an internationally standardised curriculum for training, assessing and evaluating the robotic surgeons and certifying them based on their skillset.[89] Projects such as SAFROS,[90] an initiative of the European Commission to shape the digital future, are necessary to be adopted internationally to regulate the robotics industry in medicine and health care. SAFROS, i.e. Safety in robot surgeons' hands, is a research project adapting an existing framework to improve the level of patient safety currently achievable by traditional methods.[91]

Technology has been established as a key enabler for better healthcare throughout the COVID-19 crisis and beyond.[92] This integration of technology and healthcare is evolving through the needs of the world at large. Before human dependence on robotics increases, it is essential for the legal framework to address the disputes that may arise. This regulatory frame, through accelerated adoption of digital technologies and solutions, must focus on patient safety and high quality care. It is essential for there to be internationally harmonized standards regulating robotics in the healthcare industry, assuring the use of robotics only when they are proven to be safe, efficacious, and of high-end quality. Robotic surgeons must undergo a rigorous and reliable certification process for standardization and must be independently insured to account for the damages caused due to their actions or inactions. In addition, the patients must also be informed and prepared completely about their lives being given in the control of these electronic circuits, arms and fingers made of stainless steel, with full disclosure of their advantages as well as flaws. This would enable the patient to make an informed choice.

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[88] A Mavroforou, E Michalodimitrakis, C Hatzitheo-Filou, A Giannoukas, *Legal And Ethical Issues In Robotic Surgery*, 29(1) INTERNATIONAL ANGIOLOGY 79 (2010). https://read.qxmd.com/read/20224537/legal-and-ethical-issues-in-robotic-surgery

[89] Regina Faes Petersen, Fabiola Nuccio Giordano, Eduardo Villegas Tovar, Alejandro Díaz Girón Gidi, *The Road To Becoming A Certified Robotic Surgeon*, 7(1) WORLD JOURNAL OF ADVANCED RESEARCH AND REVIEWS 187-196 (2020).

[90] Patient Safety in Robotics Surgery (SAFROS), European Commission, https://ec.europa.eu/digital-single-market/en/content/safros-safe-robot-surgeons-hands .

[91] *Id.*

[92] Nitin Kumar, *Healthcare: Opportunity for a digital generation leap*, TATA CONSULTANCY SERVICES, https://www.tcs.com/healthcare-opportunity-for-a-digital-generation-leap (last accessed on June 20, 2021).

Lastly, these regulations must clearly draw a hierarchy between human surgeons and robots, holding the expertise of one over the other, to ensure that in situations of clash in opinions, the guidelines address how the situation is to be handled. Afterall, autonomous robots are designed to assist human surgeons, not outshine them.[93]

[93] Elizabeth Svoboda, *Your robot surgeon will see you now*, Outlook Nature 573, S110-S111 (2019). *https://doi.org/10.1038/d41586-019-02874-0*

EUROPEAN MIGRATION CRISIS: POLICY ANALYSIS OF THE FRONTIER COUNTRIES

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Abstract: The contemporary migration predicament in EU has utterly flabbergasted the member states and steered to unprecedented crisis in EU. The Influx of refugees through treacherous routes stemmed a stressful humanitarian calamity. To address, manage and control the current wave of migrants several policies and regulations has been established by the EU officials. However, these migration policies are deeply criticized both at internal and external levels and called upon for more humanitarian approaches. So far member states in Europe remain split and unclear in uniform migration policy response. Under the light of existing European migration crisis, this meticulous research critical evaluate and analyse the migration policy response of Greece, Germany, and Hungary as frontier countries. It is extracted that fragmented migration policy at national and EU level is key element behind the current migration mishandling. Furthermore, under the light of fundamental conclusion we advance policy suggestion to curtail the migration crisis in EU.

Keywords: Migration; Policy Analysis; European Union; Humanitarian Crisis; Influx

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INTRODUCTION

The rapid inflow of migrants especially from the dangerous Mediterranean Sea routes into Europe has significantly rattled the European institutions and resources. Current unparalleled and extraordinary migration has untied a novel debate in the political and socio-economic horizons of the European States. Additively, the current migrant crisis also magnet the eyes of international organizations and humanitarian groups, as in 2015 eight hundred and seventy-two people (migrants) lost their lives in the Mediterranean Sea while entering from Libya to Europe through boat.[1] This event is immediately followed by two breath-taking incidents, wherein the first incident three people including a child die on the coast of Greece while eighty were rescued from the frigid Mediterranean Sea. In the second event Libyan Coast Guards intercepted a cargo and found fifty-one dead migrants inside a container who had suffocated. Over the last few years these tragedies have grown in numbers and alarmed a new beginning of a pertinent tend in dominating European affairs.

Furthermore, the distribution of irregular migration in southern Europe has created an unparalleled crisis and has shocked the Southern Europe to the utmost level. Although EU member states have experienced the phenomenon of mass migration in the past but the current inflow of migrants and asylum seekers has reached another level which is thought-provoking. Poverty, internal conflicts, and political volatility in most of the African and Middle East states are the main Push factors behind the incredible emigrants. On the other hand EU member states like Italy and Greece are already facing an internal financial crisis and the current migration phenomenon has worsened the situation and put great limitations on resources and finances in managing the migration issue. Furthermore due to the conflict on national interest and internal security issues whole EU has struggled in creating a uniform, comprehensive, and adequate policy to deal with the growing humanitarian crisis of migration. Twenty-seven EU countries have experienced political, social, and financial problems created by current irregular migration, and led EU member countries to narrow their national migration policies.

Thus, for the better analysis and understanding of the different migration approaches of the European Union, it is critical and imperative to address the migration approaches at the EU member state level. Hence, we look at the case study of some frontier member countries of the European Union because depending upon the geographical location and resources it offers a direct analytical approach about the effect of migration legislation on different member states. This approach will help in providing clarity on how the European Union's legislative measures helped or hinder the current migration crisis. As some EU member states have been open in implementing the regulations while others remain negligent in the execution of the rules. Such wide diversification results in direct obstruction of EU and humanitarian rules and issues. Some states in the EU particularly Southern states of Europe have very little to offer in this EU's legislative matters. Moreover they only look for financial resources to deal with irregular migration. Thus under this scenario it is interesting to look at the perspective, ideologies, implementation of regulations, and current status of countries like Germany, Greece, and Hungary.

I. GERMANY

Emerging as a key leader in the EU, Former Chancellor Angela Merkel is leading Germany for the last decade. Being an EU member state with sufficient economic and financial

[1] Jethro Mullen& Ashley Fantz., Hundreds of migrant deaths at sea: What is Europe going to do?, CNN, April 20, 2015, http://edition.cnn.com/2015/04/20/africa/italy migrant-boatcapsizes/.

resources and high influential power, Germany is one of the leading voice and stakeholder on recent migration regulations and policies which attempt to address the intensifying migration crisis. Under the migration crisis, Germany has shown hospitable responses and fully embraced its decisive role as being a prominent destination country for the majority of the migrants entering the EU. And providing migrants with significant aid, shelter, and other facilities moreover they also play an imperative role in bending the European Union's policies and legislation to facilitate migrant inflow. Under current circumstances Germany has developed as a de-facto frontrunner for both the European Union and Northern bloc of EU member states. Northern bloc lead by Germany remains critical and confronts the role of Southern member states in managing the migrant inflow and advocates the policy of burden-sharing of migrants across all EU member states.

Germany's ideological stance of open borders for migrants has been intensively criticized and raised the tensions between European Union states. Among the criticizing EU member states Hungary is notable on top that put the blame of the current migration crisis on Germany and affirms that current elevation of migrant management and crisis is the consequence of Germany's wrong support to welcome migrants. According to Abraham,[2] not only some EU member states but also German citizens and politicians disagree with the stance of the government and asked the government to step back from the migration integration policies due to which around one million migrants to cross the border and allowed secondary movement across other member states. Being an inclusive state to openly accept migrants and welcome them at all platforms, Germany has become the most important and crucial actor in the current migration crisis in the European Union, and a vital member state in shaping legislative policies of European Union to deal with the tide of inflow of migrants. In his study Abraham[3] gives the reference of Interior Minister of Germany who supported the incoming of migrants as humanitarian responsibility of Germany.

Germany's welcoming behavior towards migrants reflects long ethical history within Europe. Sonia Morano-Foadi.[4] state that Germany's history contains thorough ingrain for the immigrants, by giving the reference of Second World War author signifies the great inflow of people and Fall of Berlin Wall, which equipped them to handle large migrant inflow. Reflecting the high volume of migrant inflow Laub[5] demonstrates that in World War II around twelve million refugees entered Germany (both East and West Germany) and were fully accommodated this fact demonstrates the accepting capability of Germany. Not only this, but Germany also brought around four million people from Italy, Greece, Turkey, Spain, and Eastern Europe through labor market programs to boost its growing economy.[6] Currently twenty percent of the German population is not a citizen of Germany and Germany is the home of 3rd biggest migrant population.[7] These statistics reveal the long relationship of Germany with the immigrants. Along with ethical reasoning, economic benefits are also among the main

[2] David Abraham., The refugee crisis and Germany: From migration crisis to immigration and integration regime, University of Miami Legal Studies Research Paper, No. 16-17, pages 8 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746659.
[3] Id. at page 3.
[4] Sonia Morano-Foadi., Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures, 19 European Journal of Migration Law, pages 223–254 (2017).
[5] Zachary Laub., Authoritarianism in Eritrea and the Migrant Crisis, Council on Foreign Relations (2016), https://www.cfr.org/backgrounder/authoritarianism-eritrea-and-migrant-crisis.
[6] Id.
[7] David Abraham, supra note 2, at pages10.

reason for the positive attitude of Germany towards current migration. Following Dinan[8] Germany's aging population applies a shortage of around three million working labor by 2022, and this demographic shift compelled Germany to intake migrants and asylum seekers especially those with an educational degree. Under the light of ethical and economic reasoning and after the break of Germany from major EU legislation clauses in 2015 now Germany has become a humanitarian beacon and brightest hope for many immigrants.

Germany adheres to the EU migration policy as soon as the migration crisis spread-out across Europe and remained a devoted supporter of the European Union's legislative policy. Furthermore advocated and demanded all member states to follow policies under uniformity and cohesiveness. But the frustration increased as Italy and Greece remained fail in addressing the irregular migrant inflow. Thus under these circumstances Germany changed its ideological stance in the last quarter of 2015. Under massive and rapid inflow of migrants in Europe and growing secondary movement of migrants derived Germany to reverse its stance and ultimately Germany suspended its involvement in Dublin Convention.[9] Under the suspension Federal Migration Officers of Germany stopped inspecting the refugees coming from Syria which lead unimpeded flow of refugees in Germany. As a result Germany joined France in a binding agreement, emphasizing on the quota scheme for the resettlement of asylum seekers. This agreement enraged other EU member states (most of them are Eastern European member states) and now they blame Germany as being responsible for the current migration crisis due to suspending its involvement in Dublin Convention.

Another critical precedent was the denial of the agreement of free movement under the "Schengen Agreement" when in September 2015 Germany implemented provisional border check with Austria as they were overwhelmed by the growing migrant trafficking.[10] Following Germany, many EU member states e.g. Hungary, Poland, Austria, Slovakia, Czech Republic, and Croatia instigated a similar measure later placing serious doubts on the legitimacy of the Schengen Agreement.[11] Furthermore another controversial response of Germany was when they also adjourned safe country policies as they were unable to block and control the flow of migrants and blamed other EU member states for the unchecked secondary movement of migrants.[12] Overall, these controversial actions of Germany regarding migration policy and border control lead to reverberating consequences throughout the European Union.

Before the current migration situation, Germany's policy towards migrants has always shown openness and even echoed by Former Chancellor Merkel. Germany was the first country in the World that entrenched the humanitarian program for Syrian refugees in 2013.[13] In the coming years they continued to establish inclusive policies to facilitate migrants e.g. shortening asylum process by three months, add more countries in the third country list, and relaxing the

[8] Desmond Dinan., Neill Nugent. & William E. Paterson., The European Union in Crisis, Bloomsbury Publishing (1st ed. 2017).

[9] Stefania Panebianco., & Iole Fontana., When responsibility to protect "hits home": the refugee crisis and the EU response, 39 Third World Quarterly 1–17, pages 1 (2017).

[10] Fulvio Attina., Migration Drivers, the EU External Migration Policy and Crisis Management, Social Science Research Network, pages 20 (2017), https://papers.ssrn.com/abstract=2894804.

[11] Leonard Seabrooke & Eleni Tsingou., Europe's fast- and slow-burning crises, vol26, Journal of European Public Policy pages 475 (2018).

[12] Fulvio Attina., Migration Drivers: the EU External Migration Policy and Crisis Management, Social Science Research Network, pages 27 (2017), https://papers.ssrn.com/abstract=2894804.

[13] Lucrecia Rubio Grundell., EU anti-trafficking policies: From migration and crime control to prevention and protection, Policy Migration Centre Policy Brief, pages 7 (2015), http://cadmus.eui.eu/bitstream/handle/1814/35745/MPC_PB_2015_09.pdf?sequence=1.

restrictions of the migrant's labor force.[14] In 2015 when the migration crisis was building up and migrants were entering Germany through secondary movement from Hungary, even at that time Germany clogged the deportation of migrants, the same approach was utilized in 2011 against Greece. In the last five years Germany also lax its deportation laws adding more to its humane approach, around 200 thousand refugees whose asylum applications have been repudiated are still living in Germany. According to Abraham[15] denied asylum applicants still receive healthcare services, they have the permit to work and children still receive free education in Germany. By suspending the interview requirement, Germany established a new and more facilitating asylum process for Syrian and other religious refugees.[16] Although under EU migration policy, member states were unable to build consensus on the redistribution of migrants after the suspension of the Dublin Convention Germany can implement the same redistribution process within Germany. This distribution system is called "Konigsteiner Key" according to which 21 percent of asylum seekers are located in Rhine-Westphalia, 15 percent in Bavaria, and 5 percent in Berlin.[17] To equip and facilitate reception centers for the incoming migrants Germany spent around $1 billion in 2016.[18] Through adequate economic resources, management, and strong integration policies Germany can meet all humanitarian standards for refugees.

Instead of such inclusive migration policies, Germany still experiences difficult challenges. Germany is induced to follow perpetuating principles of EU's cohesiveness and at the same time continue open acceptance of refugees and migrants. Furthermore shrinking local and state resources apply further constraint, due to which Germany government is experiencing an anti-immigration attitude at the local level.[19] At the same time many politicians in Germany pushing the government for restrictive migration policies to manage economic and security risks. Furthermore xenophobia is also on the rise within Germany, and anti-Islamic groups are aggressively criticizing current migration policies of the German government. In his research Dinan[20] elucidate that instead of internal criticism by the politicians and the anti-immigrant group German government is continuing with the open migration policy. With the growing inflow of migrants and depleting economic resources, the criticism continues to accelerate putting more pressure on the German government to shift its migration policy.

Since 2012 Germany and Sweden received 50 percent of the overall asylum requests.[21] According to Eurostat in 2018 Germany received around 450 thousand asylum requests, the majority of these requests were from Syrian migrants which comprise 60 percent of the applications. In addition to this 20 percent of the asylum applicants were Afghanis.[22] Out of the total asylum applications 168,114 asylum decisions are made by the German Office for Migration, with a 34 percent acceptance rate.[23]

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[14] Id. at page 4.
[15] Abraham, supra note 2, at pages 3.
[16] Laub, supra note 5.
[17] Id.
[18] Desmond Dinan., Neill Nugent. & William E. Paterson., The European Union in Crisis, Bloomsbury Publishing (1st ed. 2017).
[19] Id.
[20] Id.
[21] Trine Svanholm Misje., Transnational Governance of the European External Borders: The case of Joint Operation Triton, (University of Bergen Master thesis), date June 15, 2019, https://bora.uib.no/handle/1956/20049.
[22]Eurostat, Asylum quarterly report, (2018), http://ec.europa.eu/eurostat/statisticsexplained/index.php/Asylum_quarterly_report.
[23] Trine , supra note 21, at pages 8.

Also through numerous EU legislations, Germany remains committed to receive more migrants. Under the EU reallocation agreement, Germany accepted more migrants from the borders of Italy and Greece in 2016. According to the EU European Commission, 2016 Germany accepted 21.91 percent more migrants proposed from Italy and Germany. Moreover in 2017 European Union announce to reallocate addition 120 thousand people due to rapid increase in migrants entering Greece, Italy, and Hungary, under this distribution Germany accepted 4 thousand migrants from Italy, 14 thousand migrants from Greece and 13 thousand migrants from Hungary as it was mandatory to share (21.91 percent) according to the committed agenda, which was 18.42 percent in the original Migration reallocation Agenda of 2015.[24]

By looking at the historical approach, current trends, and policy response of Germany towards current migrant inflow, we see an open and inclusive approach of Germany toward current migrant inflow. Germany's inclusive migration approach is prominently reflected in key elements of EU Migration Agenda and legislative doctrines. Through positive asylum acceptance programs, humanitarian efforts, and resettlement schemes, Germany established its leadership role in the European Union regarding the migration crisis. Germany's response to the current migration crisis suggests its holistic approach within the EU which also sees migration issues with humane lens. Germany has always advocated solidarity and burden sharing policies all across the EU to take off the pressure from Southern and Northern states of Europe. EU's unified resettlement plan and rapid processing of asylum applications reflect the active and humane approach of Germany towards migrants and burdened EU member states. Since the implementation of restrictive migration policies by some member states, Germany worked determinedly to sustain cohesiveness among EU member states by taking more burdens of migrants. But still, restrictive migration policies among European member states are a big threat to the EU and divided the Union. Moreover growing anti-immigration concerns within Germany raises further challenges for Germany's current approach towards migrants. Thus by looking at the case study of Germany it can be constructed that Germany's inclusive migration perspective has resulted in varying concerns within Europe. Along with the strained association with EU member states, Germany is also facing opposition within itself.

II. HUNGARY

In the previous part we discussed the case study of Germany and see an inclusive, cohesive, and burden-sharing approach towards migrants, on other hand as far as Hungary it concern it is opposite to Germany in dealing with the current migration crisis. After entering in European Union in 2004, in a very short time Hungary has become a very prominent influencing leader in the Eastern part of the European Union and openly resisted the liberal approach of Germany towards migrants. Along with other Eastern European countries, Hungary has strongly opposed the EU's resettlement scheme and advocated that every country is prerogative in adapting its migration policy and approach towards migrants and asylum seekers.[25] Supporting the country's migration approach, Hungary argues that each country should guard its interest, keeping its resources and abilities intact. On the resettlement legislation Hungary openly threaten European Union to court over and remained very vocal

[24] Eurostat, supra note 22.

[25] John M. Sapoch., Europe's Outsourced Refugees: Contextualizing NGO work in the Calais of the Balkan (Date May 2018) (B.A. thesis, Bates College) .

and firm on its stance. According to Estevens, J[26] to avoid the entry of migrants, Hungary followed the philosophy of protectionism and border control.

In 2015 Hungary called EU migration policy as "Germany's issue", the same year the relationship between Hungary and Germany further deteriorate when Hungary overlook the movement of around 350 thousand people who used Hungary as a transit country and moved into Germany.[27] Syrian and Afghan migrants used Balkan states such as Hungary, Macedonia, and Serbia as transit states to reach Germany as destination country under such circumstances when migrants are using Hungary only as a transit state, Hungarian government restricted its activities on managing migrants and limited them to only registration of asylum seekers in 2016. In the coming days Hungary implemented more restrictive measures on border control and asylum applications reduced significantly.[28] According to Murray and Longo[29] by adopting a restrictive migration approach, Hungary constructed a 110 mile stretched barrier of the Hungarian-Serbian boundary to control the illegal entry of migrants into their territory. The act of building a fence has been intensively criticized by many human rights groups and Germany as it was a clear violation of the Schengen Accord. Going one step ahead in the implementation of restrictive migration policy, Hungary instituted military force under the "Decisive Action" declaration to deter people from crossing the Hungarian border illegally.[30]

In 2016 the Hungarian government instituted criminal code that people traveling Hungarian territory without proper documents will be prisoned for three years, and those nationals who support illegal migrants will be criminalized.[31] Demonstration of Hungary's criminalization ideology became well apparent when around one thousand Syrian and Afghan migrants were jailed by the border control security in 2017.

Under the current migration crisis, the EU and Hungary look divided, Hungary believes that acceptance of migrants is their country issue and the EU does not have the right to force Hungary to accept asylum seekers.[32] Hungary believes in autonomy over its domestic and foreign affairs, claiming the multicultural approach of Western Europe and Germany will not work within Hungarian soil,[33] reflecting a clear break with European Union's policies and structure. Hungary believes in looking at the external solution of the current migration crisis and emphasis that the EU should close its borders. By external solutions Hungary considers that the EU should provide financial support to Turkey, Jordon and other countries of conflict to improve the conditions of refugees. Furthermore international stakeholders such as the USA and Arab nations should also take migrants and refugees that exceed the managing capacity of the EU.[34] At the same time Hungary calls an increase of budget for Frontex for more effective security measures and criticizes Greece for its weak managing ability to control migrants within its borders. On the other hand, Hungary's neighbor Croatia blamed Hungary of massive migrant inflow inside Croatia which is happening due to the close borders of Hungary, even

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[26] João Estevens., Migration crisis in the EU: developing a framework for analysis of national security and defence strategies, 6 Comparative Migration Studies pages 18 (2018).
[27] Philomena Murray., & Michael Longo., Europe's wicked legitimacy crisis: the case of refugees, 40 Journal of European Integration 411–425, pages 4 (2018).
[28] Lucrecia, supra note 13, at pages 4.
[29] Philomena., & Michael, supra note 27, at pages 11.
[30] Georgia Mavrodi., Common EU policies on authorized immigration: Past, present and future, pages 3 (2015), https://cadmus.eui.eu/bitstream/handle/1814/36115/Common-EU-Policies-on-Authorised-Immigration%20%281%29.pdf?sequence=2&isAllowed=y.
[31] Id. at pages 7.
[32] Id. at pages 11.
[33] Id. at pages 5.
[34] Sonia, supra note 4, at pages 232.

after this criticism Hungary continues with its current stance and anticipate building a fence on the border of Croatia.[35]

In response to Hungary's restrictive stance on local legislation in constraining the right of appeal on asylum decisions, the EU declares to take Hungary to court as it is against the European Union's law and rights of asylum seekers. European Union also criticized Hungary over its rapid deportation system. But Hungary continues with the concept that the EU needs to develop and implement tougher migration policies, and if the EU continues with the same approach sooner all member states will be destabilized.[36]

As far as the restrictive ideology of Hungary is concern it fully supported by the local people and anti-immigrant political parties. In a recent poll 82 percent of the people stand with the Hungarian government on firm immigration control.[37] In his research Tazzioli[38] describe Hungary as a mono-culture and homogenous society as being the main reason for internal support for tight border security measures and high polls in the favor of a more strict migration approach. According to Eurostat database in 2016 Hungary received around 180 thousand asylum applications, out of which 110 thousand applications were processed and only one thousand asylum seekers were accepted and in the coming years these figures further depleted.

After reviewing some of the facts and ideologies in the case study of Hungary it is clear that Hungary adopted quite the opposite reaction to the unified and cohesive EU approach. So far Hungary is very vocal on EU's migration policy and openly criticized Germany's position, citing its ideological and cultural difference with other EU member states. Talking about strict border control, Hungary supported EU's attempts on out of border solution by coordination with Turkey and other countries, but at the same time emphasizing that the EU needs to rethink its multiculturalist approach. Through restrictive border control Hungary can divert the flow of migrants to other Western European states. As the migration crisis is growing, more EU member states start to support Hungary's ideology and implementing alike restrictive measures. Hungary's restrictive policy is opposite to Germany's cohesive approach in resolving the migration crisis, although in the beginning it was vastly denounced by the member states but with the passage of time attainment more adhesion inside EU.

III. GREECE

Under the current migration crisis, Greece has quite discrete experience in comparison with both Germany and Hungary, who already had their differences in managing the influx of migrants. As being the largest gateway to Europe, Greece has experienced a massive flow of irregular migrants over the last eight years. Like Italy, Greece is completely overwhelmed by the rapid migrant inflow. These countries (Greece and Italy) have been intensively criticized by other EU member states; firstly for the inability to control immigrants on their borders and secondly due to heavy EU assistance. Like other Southern member states, Greece has called for European Union's resettlement quota scheme to support swamped asylum systems. And EU pleaded to support the struggling state. Due to its geographical location and long coastline, Greece is the easy entrance spot for irregular migrants. According to the statistics of IOM, in 2016 almost 90 percent of the irregular migrants entered the EU through Greece. Over the time Greece has been compelled to manage irregular migrants on the Aegean Sea and Turkish

[35] Id. at pages 229.
[36] Mavrodi, supra note 30, at pages 13.
[37] Martina Tazzioli., Containment through mobility: migrants' spatial disobediences and the reshaping of control through the hotspot system, vol.44, Journal of Ethnic and Migration Studies 1–16, pages 2770 (2017).
[38] Id. at pages 2769.

border. Only in 2016 around 850 thousand migrants entered Greece and out of those 98 percent entered via the Aegean Sea route.[39]

The historical challenge of 2008's economic recession remained devastating for Greece. The economic recession led Greece into huge public debt and bankruptcy which ultimately created a suppressed social and economic climate which not only affected local people but also immigrants. The shrinking economy rose tension between the native and migrant populations of the country. Following Morano-Foadi, S[40] economic crisis in Greece fueled anti-immigrant trends all over Greece and provoked nationalistic tendencies. The decimated economy and growing migration left Greece to a devastating situation in dealing with the migration crisis. At the beginning of the current migration crisis, Greece tried operational interventions to control irregular migration by deploying coast guards on the Aegean Sea and surveillance procedures on the borders with Turkey. To control the borders Greece constructed 7.8 miles long fence alongside the Evros River and with the help of the EU deployed Frontex to check the irregular migration. Although this strategy worked but it pushed refugees back to the Aegean Sea route.[41] Along with the above-stated operations, Greece also carried several other controversial measures in concessive sessions to push-back the migrants which raised severe allegations by the UNHCR and other human rights groups on the inhumane approach.[42]

Apart from poor and inhumane management of refugees and asylum seekers, Greece's legislation on the detention of irregular migrants raised further concerns. According to Greek laws those irregular migrants who are unable to provide proper documents should be kept inside detention centers for 18 months or deported, and have become the cause of controversy in the European Union and international community.[43] International organizations such as the Council of European Committee on Human Rights, UNHCR, and Amnesty International denounced Greece's detention center policy and management.[44] Furthermore the growing flow of migrants in 2015 from Turkey made management more difficult for Greece. As far as financial assistance is concern the EU allocated around 76 million euros for Greece in the last four years to construct new reception centers for incoming refugees and to provide food.[45] But according to Greek government allocated funds are not enough to fully address the dramatic inflow. Apart from this, poor border management and control persist in Greece where only in 2017, 547 refugees died while crossing Sea route.

Under these circumstances, the new government (2019) brought some alteration in the existing policies by abolishing the 18-month detention policy and established integration programs and voluntary return of the refugees.[46] In the last few years Greece made some improvement by constructing 20 thousand new receptions centers, committing to increase capacity over 30 thousand, more humane approach under UNHCR's rental scheme, and voluntary return of around 20 thousand illegal migrants.[47] Despite of constructive initiatives, Greece still requires a lot to move out of the chaotic situation. Greece still requires an inclusive

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[39] See the Web: https://migrationdataportal.org/data.
[40] Sonia, supra note 4, at pages 235.
[41] Id. at pages 242.
[42] Fulvio Attina., Migration Drivers, the EU External Migration Policy and Crisis Management, Social Science Research Network, pages 25 (2017), https://papers.ssrn.com/abstract=2894804.
[43] Id. at pages 26.
[44] Id. at pages 20.
[45] Leonard & Eleni, supra note 11, at pages 472.
[46] Alexandra Porumbescu., Migration Policies in the European Union: Espoused perspectives and practices-in-use, 46 Revista de Stinte Politice 165-176, pages 169 (2015).
[47] Leonard & Eleni, supra note 11, at pages 476.

return policy for illegal migrants and more detention centers to place incoming migrants to avoid their further movement deep into Europe. As far as the EU's assistance is a concern, through EU resettlement scheme many member states are obligated to take 66 thousand refugees from Greece by the end of 2018 but under this scheme, only 5.7 thousand refugees are allocated in other EU member states, majority of them are accepted by Germany.[48]

Although the government of Greece and the EU, the European Commission placed some strategies to address and manage the problems, but Greece still need a lot to retrieve from the unbearable burden of irregular migration. By concluding the case study of Greece, it is elucidated that over the years Greece has become the pivot point of the current migration crisis across the EU. The massive inflow of refugees and irregular migrants crowded their borders and overwhelming their economic resources. Despite the huge criticism of Greece's inability and inefficiency in managing the refugees and asylum seeks, EU member states still continue to support Greece in terms of resources and legislation. Somehow many member states can relieve migration flow through border controls but Greece lacks this luxury due to its location as a port of entry into Europe. Adherence to the European Union and International laws in accepting a huge influx of migrants, Greece faces the problem of humanitarian crisis. Going through the economic crisis, Greece has been financially supported by the EU but not enough, as far as the EU's legislation on resettlement and burden sharing is concern it largely looks flat in its implication. If the European Union's low financial support and inability to implement the resettlement scheme continues it looks that Greece will continue to suffer in the coming years.

IV. DISCUSSION AND ANALYSIS

In the previous section, the case studies of Germany, Hungary, and Greece provide an informative insight into the different ideologies, perspectives, and strategies of EU member states to deal with the migration crisis. These diverse methodologies reveal responses of member states towards the European Union's legislation on migration. All three case study countries exercise migration policies to varying extend. Hence it is inevitable to consider the varying trends and build informative insight both at the national and EU level. Keeping the extracted knowledge, now in the following section we discuss and glean holistic analysis. By building insight into national and EU level issues we offer a variant perspective to the European Union's migration policy under the current migration crisis.

A. National Level Trends

Management of migrants and negative responses of natives are the utmost pertinent trends at the national level in response to the current migration crisis in the EU. Within the illustrated case studies the legislative development raises the humanitarian concerns afflicting the reception settings for migrants. Such concerns are predominantly evident for Hungary and Greece and well explicated in the case studies. From case studies of Hungary and Greece it is clear that local stakeholders such as government and NGOs lack financial and personnel resources to manage the continuous inflow of migrants within their states. Particular reference to Greek, it is observed that migrant reception centers are already overwhelmed by the migrants and incoming migrants are maneuver to central EU states through secondary movement. Hence these secondary movements of migrants increase the tension among EU member states, and yield legal and ideological fractures between member states. Due to restrictive border controls on the Hungarian border, a huge number of migrants have been waiting with inadequate food and water resources, causing the peril of humanitarian crisis. Hungary's restrict border control

[48] Id. at pages 475.

policy, the building of border fence and criminalization policy towards refugees; have rigorously hindered the rights of international migrants and escalated the pressure on member states.

The case studies of Germany, Hungary, and Greece reflect the inundate of migrants into the cities of Europe through primary and secondary movement and asylum applications. At the same time migrants have faced the problem of inadequate food, water, and shelter resources. Migrant pressure and insufficient resources for migrants (humanitarian concern) have placed EU member states in a very awkward position which is well reflected in reverberating and unclear EU migration policy. On one hand, EU member states such as Germany, Italy, and Greece have to sidestep from some of the migration policies and protocols of the European Union. On the other hand few member states like Hungary, Sweden, Serbia, Denmark, and Austria have shut their borders for migrants, which further intensifying the humanitarian crisis.

Under these mounting concerns EU legislation tries to address the migration issues through more aid and support for those EU states who are going through the severity of migration. In addition to this EU legislation also created a roadmap for member states to mitigate the pressure of irregular migration. However, even after spending billions of euros on the migration agenda, the EU has failed to accomplish its main objective on the migration agenda. Moreover, other key regulations such as Legal and Operational measures under EU's Agenda on Migration, Seventeen point Action Plan for the Balkan States, and Emergency Measure Proposal of International Protection also unable to achieve desire goals. And as a result of failed policies, many people still entering Europe through Greece and the Balkan States. Using the reference of Greece, where many regulations stipulated through the EU's Migration Agenda, have yet to be fully operational, exacerbate more complications for countries of entry. At the same time promises made with member states through EU legislation have done very little in managing the migrant inflow. The case studies of Greece, Hungary and Germany articulate varying effects of EU's migration policy in managing migration crises and the same tend can be extracted for other EU member states. As a result of the lackadaisical and ineffective response, many member states abandon the European Union's migration policies and implemented national border control measures.

In addition to insufficient resources, the negative sentiment of natives toward migrants is evident in the case studies. The emergence of anti-immigrant parties and their increasing support both at the local and national levels highlight the mistrust in the current migration policies. The rise of anti-immigrant parties in EU member states also reveals that migration policies are unable to manage the migration wave. As the negative perception of natives is increasing towards migrants, it does influence the migration policies of the states and is well evident in the case studies of Germany and Hungary. In Germany the national migration policy is closely associated with the overall EU's migration legislation, and a more welcoming approach towards migrants is engaged. But at the same time many local groups in Germany are raising their voice against the current national migration policy. Regional states in Germany like Bavaria have started to implement restrictive measures towards incoming migrants, and it seems that shortly it will be difficult for the government to continue with the same supportive approach towards migrants. In Hungary restrictive migration policies helped the government to again the local support and persistency in policy implementation that contradict EU's migration legislative approach. The same anti-immigration and restrictive trend exists in many other EU member states, where locals/natives are becoming supportive of anti-immigrant and border control policies and approaches in dealing with the current migration crisis.

B. EU Level Trends

Lack of cohesive migration policy and solidarity on the current migration crisis among member states are the critical issues derived in this research study. The case study of Germany and Greece is a clear example of opposite and divergent ideology and approach on the issue of migration. This divergent policy approach has polarized the whole European Union. With the continuously growing crisis more EU member states are deviating from the EU legislative policies and moving towards national migration policy approaches that follow restrictive and closed border measures. This lack of uniform policy measures are not only creating mistrust among member states but also directly influence the effectiveness of the European Union's legislation on the migration issue. In the resettlement scheme, the EU proposed to reallocate 160 thousand migrants among member states by 2016 but only 250 people have been resettled,[49] reflecting mistrust of member states on the EU's migration strategies.

Furthermore, Dublin regulation which is a key protocol document of the EU for asylum-seekers has been dropped by Germany and many other member states. In response to this European Union has threatened the member states, signifying the weakness of EU legislation. This conflict among member states has shaped an evident problem within the European Union, marking a visible dissimilarity among member states on the implementation of the EU regulations. This philosophical disintegration has led to clear consequences for migrants, who are already suffering due to the lack of international protection.

Lack of harmony among EU member states is the most problematic issue in the enforcement of EU regulations. The whole EU project to manage migrant crisis has been jeopardized due to the inefficiency in implementing migration policies and immense opposition by member states. The action of restrictive migration policy is a clear violation of the Schengen Accord, assuring the free movement within Europe. Due to the border control measures taken by member states, this hallmark (Schengen Accord) is under attack and might lead to dire consequences even after the end of the migration crisis. In his study Cendrowicz[50] also raises the same concern that if immediate progress is not made on the current migration crisis, the Schengen could fail. Thus the current migration crisis has raised serious concerns on the integration of the EU.

C. External Trends

There exists a clear gap in the European Union's migration policy regarding the EU's collaboration with external partners. EU's deal with Turkey has opened a new arena in mitigating the migration crisis in 2016, but since then no radical collaboration is observed between EU and with external partners. Many EU member countries particularly Hungary advocates the increasing collaboration and works with countries of origin and countries of transit such as Lebanon, Jordan, and Turkey. This collaboration insists the EU to improve the asylum system and refugee camps in countries of conflict. To date, the majority of the external policies of the EU consist of financial incentives for third countries, and very little importance is given to the persecution and internal conflict issues inside the countries of origin which is the root cause of the increasing intensity of migrants into EU. Although according to EU European Commission 2015 (Pillar I), the EU migration agenda talks about the internal

[49] Attina, supra note 42, at pages 27.

[50] Leo Cendrowicz., Could the refugee crisis really break up the European Union? Independent, date January 23,2016 , http://www.independent.co.uk/news/world/europe/couldthe-refugee-crisis-really-break-up-the-european-union-a6828581.html.

conflicts in countries of origin as the root cause of migration through institutions of European Union delegation, termination of traffic networks, increases in cooperation assistance, and establishment of immigration associate officers. However, not all of the intents have been implemented or remained effective in restricting the migration in the European Union.

Lack of cooperation between EU with external countries who are not EU's neighbors such as Canada, the USA, and Australia is the most curious feature of the EU's migration policy. EU legislative migration policy does not address the policy collaboration with these countries. Canada, the USA, and Australia already have migration policies and thus enhancing policy cooperation could help mitigate asylum pressure from Europe. The EU's migration policy focuses more on internal legislation and less on external cooperation, which has yielded critical consequences. Such a policy-driven approach of the EU shows overwhelming tendency aiming at achieving short term legislative goals rather than focusing on permanent or long-term strategies. Thus due to this reason many cracks have developed.

Along with the external policy gap, there also exists a cavity in the EU's migration policy regarding support for country of entry and transit country, and hence appeared as a serious problem between member states. The fragmented stance and philosophical differences among EU member states have steered to enforcement problems of migration laws and further divided member states, propagating the human rights crisis. The case studies of Germany, Greece, and Hungary well explicate the outlined problem. In the end, it is worth noticing that without improving the key elements discussed in this study, it is difficult for the EU to eliminate the current migration crisis and to maintain solidarity and unity among EU member states. Under the light of current issues discussed in the research study, the next part of the work outlines some of the significant policy recommendations to curb the current migration crisis.

V. POLICY RECOMMENDATION

Based on the detailed critical analysis discussed in previous sections of the study, the following part of the research constructs some important policy recommendations by applying the Neo-functionalism and Inter-governmentalism theories which describe the behavior of European Integration relevant to migration crisis. The policy recommendations aim to capture the key problem concerns addressed within the current migration crisis in the EU. Here we suggest short- and long-term policies targeting both general and specific approaches towards the EU's migration crisis.

A. Short-Term Policies

- Under a common migration problem EU member states practice divergent and segmented migration policy, rising huge concerns on the solidarity and economic interdependence of member states within EU. Hence, uniformity in migration legislation and practice is inevitable for the sustenance of EU.
- For full identification of the people entering Europe, European Union Commission needs to strengthen border controlling protocols, through both physical and financial enhancements. By doing this, the EU can address and manage both security and humanitarian aspects under international laws.
- For the safety of migrants entering Europe through sea routes, the EU needs to monitor and improve search and rescue operations on humanitarian grounds.
- EU Commission and member states need to enhance information sharing systems both within Europe and with external countries. Information sharing involves the transfer of knowledge, skills, and training for proper policy channelization.

- Effective and transparent enforcement/implementation of EU migration legislation across all Europe for irregular migrants and asylum seekers, which aptly ensure international protection laws.
- Improvement and expansion of reception centers for both existing and income migrants. And also to counter possible perilous situation with the local communities.
- For the practicality and effectiveness of the policy approach, the EU needs to develop a more efficient information transfer system between border control agencies and policy formulation bodies.
- For better border management of sea routes, the EU needs to expand and clarify the role of Frontex (EU border control security on sea routes) on humanitarian grounds.
- EU needs to revise and re-analyze the Dublin Convention particularly the integration and redistribution mechanism. In integration and redistribution mechanisms human rights standards and migrant needs should be prioritized.
- EU needs to develop strong residence and employment incentives to promote legal migration inside the EU. European Union also needs to revisit and soften the legal immigration laws to facilitate humanitarian and economic migration.
- To curb migrant smuggling and trafficking, the EU should prioritize and implement stick legislation.
- Lastly, to share the financial burden of Balkan and Southern member states, EU Commission needs to increase the financing and budget of the Internal Security Program and Asylum and Migration Integration Program.

B. Long-Term Policies

- European Union needs to increase the financial and economic development support for those third countries which are associated with the current migration crisis. Financial and economic support to assist refugees within a third country, to build economic resources and local structure which are the potential destabilizing factors and push factors for migration towards Europe.
- For the effectiveness of the asylum system, EU Commission needs to increase the budget for the Common European Asylum System (CEAS).
- To empower and incentivize the third countries, the EU needs to increase and broaden its relationship with third countries, which are not Eurocentric. Besides, the EU needs to initiate co-development and other incentives for third countries to keep migrants inside their home countries, by addressing their social, political, and economic problems.
- EU needs to re-think about the resettlement scheme of migrants and should involve private communities, church organizations, and NGOs. United States and Canada has been fairly successful in getting fruitful results of such resettlement schemes.
- To upturn the effectiveness of migration policy mechanisms, there is a need to increase trust, equal responsibility, and cooperation among member states. Coordination among member states include harmony on resettlement and reallocation scheme and cohesiveness on all conventions and accords which are established to tackle the current migration crisis.
- As it is a universal realization that internal conflicts, poverty, political turmoil, lack of education, and persecution are the root causes of global displacement and the main drivers of the current migration crisis in Europe. As part of this, the European Union needs to find both financial and political possibilities and solutions inside countries of origin to curb global displacement and migration issues.

- With the collaboration of UNHCR, the EU needs to develop a global protection scheme, aimed at the relocation of vulnerable groups, which should involve other developed countries along with European states.
- Lastly, the EU should establish long term migration policy goals involving a multi-sector approach such as; foreign affairs, socioeconomic cooperation, trade cooperation, and political concerns.

The current migration crisis in the EU has created numerous problems within Europe. A huge influx of migrants into the EU and insufficient management response has put the European Union into an unjustified position. EU's legislative agenda on migration has peddled both security and humanitarian approaches but the EU's response towards these objectives has been substantially criticized and rejected by member states, international authorities, and corresponding researchers. As this meticulous research study has shown that EU needs to change its approach towards current migration crisis and need to do more to address the surfeit of negative trends, hazards, and loopholes inherent within its current status and migration policies. Moving forward, for the adequate response the European Union needs to utilize persistent policies recommended inside in this study for both internal and external migration support systems. As part of this work, researchers and policymakers need pressing look at changing trends within the migration crisis for up-to-date and effective policy implications in different migration programs, interventions, agreements, and legislation. Lastly, the current migration crisis in the EU will endure to be an excruciating liability and burden on the member states providing conflict and segregation continues to dawdle in the migration management procedures and actions.

CONCLUSION

Since 2015, a huge influx of migrants into Europe has led to unprecedented damage to almost all EU member states and particularly damaged the solidarity of Europe as one unit. In response to the migration crisis, numerous novel legislation and regulations have been developed to mitigate the problem. Since 2015, five regulations have been executed which give insight into the migration crisis and main trends. They also provide sight on migration policies, few amendments, and legislative objectives. The main philosophy of these regulations includes the concern of many EU member states to; control borders through protection system, accurate tracking, monitoring and assessment of incoming irregular migrants, coordination, technical assistance and new protocols for agencies, collaboration with third countries to curb migration pressure and humanitarian concerns of displaced people.

Along with above stated main objectives of the regulations they also aimed at; to ensure the solidarity and unity of EU member states, technical and financial support for struggling member states like Greece, comprehensive and effective asylum system, controlling the secondary movement of migrants within Europe and to manage resettlement and reallocation of migrants with harmony. Although EU's legislative approaches tried to encompass all the core issues related to current migration crisis but never yielded desirable results; lack of harmony and political will of EU member states to participate in the reallocation of migrants particularly UK, Austria, Hungary and Sweden, preference of national migration policy over EU legislation, insufficient financial support of EU Commission for Greece and Italy, fragmented border control policy and polarization and grouping among member states on the issue of asylum registration and resettlement and the inability of EU to find the external resolution of migration crisis has led to overwhelming damage to EU member states and even conflicted the future of EU. At the same time insufficient human approach of the EU towards

migrants also remains a burning issue as the implication of migration legislation remains inadequate to fulfill the international migrant laws and human rights of displaced people. All these factors elaborate on the desperate nature of the EU dilemma.

Under these circumstances this research study suggests some key policy recommendations which include internal and external possible solutions. Internal resolutions include integrated and cohesive migration policies to address; protection of human rights of migrants, fair and collaborative resettlement schemes, end-to-end management of security mechanisms, humane asylum-seeking system, and more financial support for struggling member states. At the same time, the EU needs to reevaluate migration postulates and approaches established in Schengen Accord and Dublin Convention. Along with these internal possibilities the EU also needs to address the root causes of the current migration crisis and needs to involve external countries and countries of origin/conflict in migration legislation. External countries can share the load of migrant flow and by building cooperation with countries of origin through economic support and political influence, future migrants, and be avoided to enter Europe. Without addressing external possibilities and root causes, EU's migration policies and legislations will probably continue to fall flat.

CHINA'S POLICY RESPONSES TO THE CORONAVIRUS PANDEMIC

Ge Zheng; trans., by Wenrui Ding, Yujie Gu, Weijun He, Wenwen Li and Xuechang Wu*

Abstract: To date, the total number of diagnoses with Covid-19 all over the world has reached 488 million and the number of deaths has reached 6.14 million. In this article, after making it clear my points of view about China's measures on the pandemic, I will develop the arguments in detail through replying to the questions of (1) Is there really no other choices besides "living with Coronavirus?" (2) Is it really unnecessary to keep the "Zero Covid" policy? (3) Is the "Lying Flat" policy really useful? I will answer the above three questions by comparing Mainland China's policy with China's Hong Kong SAR and some other countries' responses to the fifth wave of the pandemic.

Keywords: Covid-19; Health Policy; Zero-Covid; Herd Immunity; China

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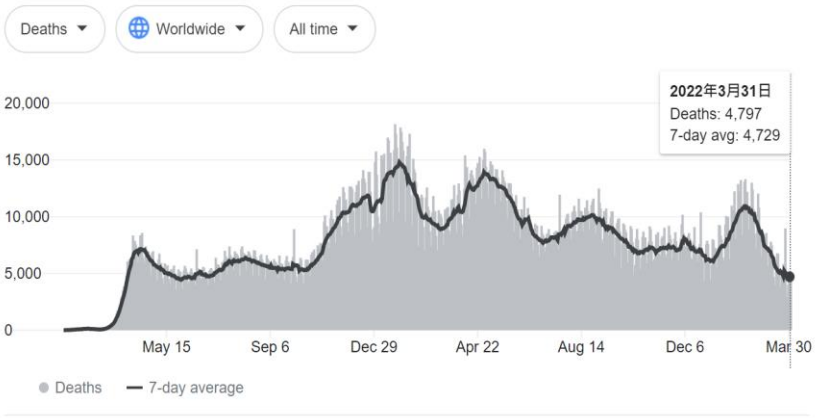
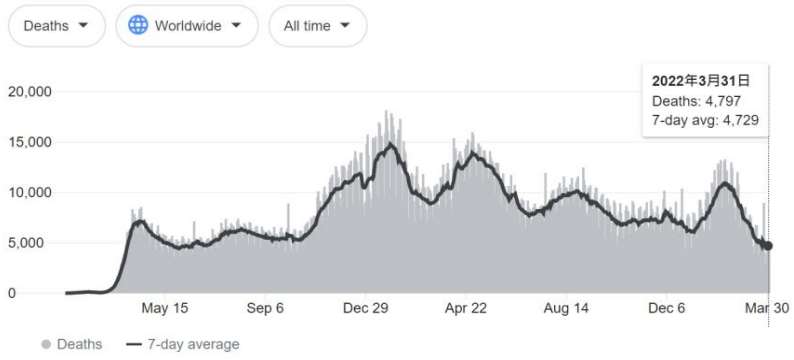
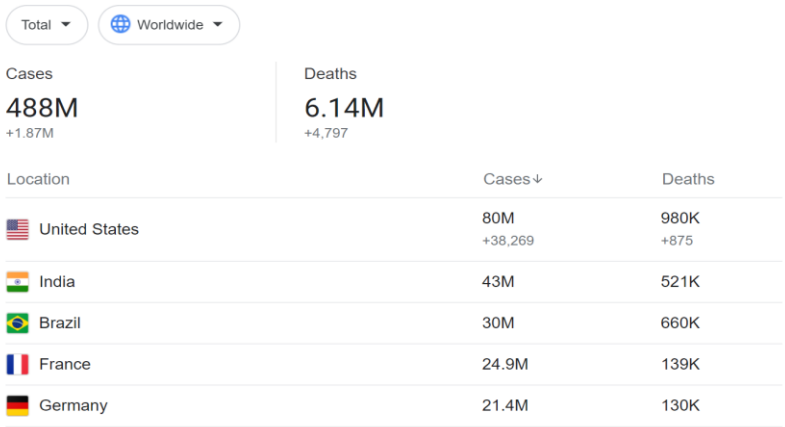
INTRODUCTION

To date, the total number of diagnoses with Covid-19 all over the world has reached 488 million and the number of deaths has reached 6.14 million. The United States, which has the most severe situation, has 80 million infections and 980,000 deaths now.







(Data Source: Our World in Data, website: https://ourworldindata.org/. The following information from this database is referred to only as Our World in Data)

In China, where the coronavirus was firstly discovered[1], because the scientific and effective measures were strictly enforced by the government, in addition to the early stage of the pandemic and the recent fifth outbreak caused by Omicron, the Chinese got the freedom from fear of infecting Covid-19 and can maintain a normal living, working and studying rhythm. The second and third waves of the pandemic had minimal impact on China, while the fourth wave (Delta) only impacted parts of China (Xi'an was the most serious hit one). Although the current fifth wave has had a great impact on Jilin Province, Shanghai, and Hong Kong, it has not spread to the whole country and is still under control.

Since this article is about an urgent issue nowadays, I will not discuss theoretical discussions and will point out personal views at first, and give brief arguments one by one.

First of all, before the Omicron variant appeared, it was quite correct for China to adopt a dynamic Zero-Covid policy, which has been proved by its results. If other countries had adopted similar policies in 2020, the pandemic would have been eradicated long ago. It is the inaction of some countries' governments such as the United States and the United Kingdom in the early stage of the pandemic that lead to the large-scale spread of the coronavirus, and it has created artificial conditions for the emergency of all kinds of variant strains. Even if the pandemic prevention policy is to be discussed today, we must clearly affirmed that, rather than advocating that the so-called "herd immunity" type of inactivity policy should be adopted from

[1] The reason to say "was discovered" rather than "originated", is that China has established a special mechanism for the detection and prevention of coronavirus after the SARS in 2003, while other countries are likely to treat patients with coronavirus as normal flu because of the lack of the similar mechanisms. In fact, after the outbreak, many countries' testing kits were provided by China. When the pandemic broke out, Christine Loh of Hong Kong was a visiting professor at the University of California. She mentioned that nearly two months after the outbreak, the United States still lacks basic testing supplies severely. For example, on February 29, California Governor Newsom said that California only had 200 test kits: "It made us terrified, why does there exist so few test kits in such a developed city?" She also mentioned that doctors in Paris looked at earlier cases and discover that one patient was diagnosed with a disease on December 27, which is called Covid-19 nowadays. This means that the virus has been spreading in Paris for some time. Doctors reported the situation to the country's health administration, but France did not report it to the WHO. Refer to Christine Loh: "Sometimes it stays the same for decades, and sometimes it turns upside down in a few weeks" which can be seen in Leijie Wei,*Waiting for Dawn: 21 Diaries From 16 Covid-19 Frontlines*, published by *Contemporary World Society*, 1st edition, October 2020 (This book is worth reading). In fact, China always supports the WHO-led investigation into the origin of the coronavirus, while the United States has refused to cooperate and has repeatedly proposed investigations that circumvent the WHO and target investigation motion of China.

the beginning. The British government completely denied that it intends to implement the "herd immunity" policy just after suggesting to adopt it a few days. Besides, the *House of Commons inquiry report of 2021* also criticized the British government intensely for being too lenient at the early stages of the pandemic (instead of "herd immunity"), which is regarded as "a complete failure of public health policy". Boris Johnson would never have imagined that there are still his supporters in the far east.

Secondly, after the emergence of the Omicron variant with a stronger spread ability and higher invisibility, should the dynamic Zero-Covid policy be adjusted in time and replaced by a more flexible and less impactive one? The proposal to change the current dynamic Zero-Covid policy is mainly for two reasons. On the one hand, there is no choice. The super-transmissibility of Omicron makes precise prevention and control impossible, and the rise of a large number of asymptomatic infections makes the investigation of patients incomplete and impenetrable. Since less than one hundred points equal zero points, it is better to "lie flat". On the other hand, it is unnecessary. Although the Omicron is super-transmissible, the severity of the disease is weaker than the original strain and the previous variant, and it is mainly an upper respiratory tract infection rather than pneumonia, just similar to influenza. It is obviously not a wise choice to prevent the flu at such a high price. There is also an auxiliary argument: other countries have loose policies and nothing bad happened. Such as "the UK has 200,000 new cases in a day, and people's lives are as usual", and "Vietnam has followed the steps of the world and achieved coexist with the virus". It is worth noticing that in the previous rounds of pandemics (such as the Zhengzhou and the Xi'an), the mainstream opinions accused the local government of being inefficient in virus prevention and failing to implement the dynamic Zero-Covid policy. The local government should learn from Shanghai, and all of us can see how well Shanghai's precise prevention and disease control is. When Shanghai faced the test of the pandemic, more and more views advocated giving up the Zero-Covid policy. This is a question worth thinking about, but not the main point of this article. In the following, I will answer: (1) Is there really no choice? (2) Is it really unnecessary? (3) Is the "Lying Flat" policy really useful?

Thirdly, due to the globalization of the pandemic, different countries and regions have made different responses based on their constitutional structures and political choices, and the consequences of these responses have also been tested by the results. The analysis of these data can save the cost of trial and error. We can no longer agree with those choices that have been proved wrong by the vivid survival test out of value identification. For those options that are effective at some stages of the pandemic, we can also see if they still work after the Omicron variant. In the following section, I will answer the above three questions with foreign experiences, as well as the situation of Hong Kong's response to the fifth wave of the pandemic.

I. IS THERE REALLY NO OTHER CHOICE?

In fact, there was one country that made a choice in the early stages of the epidemic on the grounds that there was "no other choice", it is the UK. This choice was characterized as "a policy approach of fatalism" in *the House of Commons inquiry report of 2021*. It is

characterised by “attempts to manage rather than contain the infection”. This policy choice to target “herd immunity” was very harshly criticised in the report as a “complete public health policy failure” that led to the UK missing the best time to control the outbreak.

Virtually, even the British government itself, which proposed “herd immunity”, knew that such a “survival of the fittest” and “self-perpetuating” social Darwinist policy would cause public outrage. So the government withdrew it soon after it was proposed, and denied on numerous occasions that it has attempted “herd immunity”. However, the British Parliament was clearly not fooled by the rhetoric and believed that Boris Johnson's cabinet did indeed have “herd immunity” as a policy objective in the early days of the epidemic.

In a televised speech on 12 March 2020, Prime Minister Johnson called on every Briton to “be prepared to lose their love”. The whole tone of the speech was that it was impossible to try to eradicate the coronavirus completely and that the epidemic would be long-term. It would be better to try to live with the virus from the beginning rather than to pay a huge price to eradicate it in vain. More systematically, Sir Patrick Vallance, the UK government’s chief scientific adviser, said that the epidemic will be long-term and that drastic control measures are likely to be effective for a few months. Once these measures are removed (and in his view they will be, as no country can afford the economic and social costs of taking them for a long time), the epidemic will return. Premature and drastic measures will lead to “behavioural fatigue” and a loss of vigilance and the ability to deal with another outbreak. He cited a seemingly scientific concept called behavioural fatigue, which means that if tougher measures are taken at the beginning, people will become fatigued after a while. Later, if a similar outbreak occurs again, people will be significantly less sensitive to the outbreak and less receptive to control measures, which making control increasingly difficult. Given that the coronavirus will only cause less severe symptoms in young and healthy people, the government should protect vulnerable populations (such as those over 70 years of age) and then allow the rest to live as usual. Until about 60% of the population has been infected with the coronavirus, herd immunity will develop.

The plan has aroused almost unanimous criticism from the global medical community. Yale virologist Akiko Iwasaki argued that the normal thinking should be to gain immunity through a vaccine, not through infection with a potentially deadly virus. With a little simple arithmetic, it takes 60% of the population to become infected to develop herd immunity, and in the case of the UK, that number is 36.89 million. Based on what was generally considered lethal at that time (1.4%), this would mean 520,000 people would die as a result of infecting the coronavirus. In addition, over 500 behavioural scientists signed a joint letter questioning the scientific validity of the concept of “behavioural fatigue” and demanding that the UK government publish the basis for its decision. The UK government was quick to deny that they were adopting the herd immunity. The UK Health Secretary, Matt Hancock, clarifying on 15 March that “herd immunity is not our policy objective”.

The British strategy is a social Darwinist one, reflecting a notion of survival of the fittest. Bill Hennecke, a British epidemiologist, who works at Harvard University, said: “Who do you

think is going to take care of the elderly who are 'protected'? Well-trained gibbons? The very people who look after them are the ones you think should be released to go out and infect the virus." This policy only talks about protecting the elderly but fails to consider the appropriate accompanying measures to actually protect these vulnerable populations.

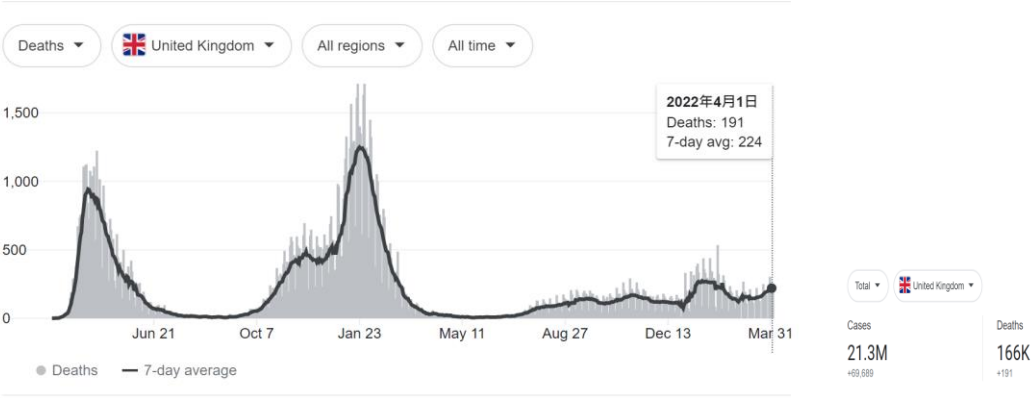
It is common sense in public health that when an epidemic has started to become a pandemic, it is imperative to slow down the spread of the epidemic so that new cases are kept within the reach of health care resources and do not cause a "run on". This is the meaning of what is often referred to in the field of epidemic prevention as "levelling the curve". Each country should adopt the standard measures recommended by public health science, including universal quarantine, tracing contact history of confirmed patients, quarantine measures, closure of public places where people gather, prohibition of mass gatherings, and guidelines for maintaining personal hygiene and social distances. The reason behind the sudden introduction (and swift denial) of the "herd immunity" strategy in the UK, at a time when countries around the world are taking these measures, is that the UK has been cutting NHS funding and staff for years, resulting in a severe shortage of public health resources. The majority of patients are required to be isolated at home, and those who are critically ill are unable to access emergency care and are forced to abandon treatment.

In spite of this, the British government has been unable to lie flat in the face of the social problems caused by the outbreak and has had to react intermittently to the serious consequences of its inaction. The British government imposed three times of national lockdown on 26 March 2020, 5 November 2020 and 6 January 2021. On the day before the first 'lockdown', the Queen sealed the Coronavirus Act 2020 passed by Parliament, making Britain the first country in the world to legislate specifically for the coronavirus.

Timeline of epidemic prevention measures in the UK

(Data source: The Institute for Government, https://www.instituteforgovernment.org.uk/sites/default/files/timeline-coronavirus-lockdown-december-2021.pdf)

But this strategy of lying flat as the aim and responding passively as the exception has failed miserably, leaving the UK "fall between two stools" and with very serious consequences. To date, the total number of diagnoses in the UK has reached 21.3 million (32% of the UK population) and the number of deaths has reached 166,000, with a daily average of 224 deaths in the last week. It is clear that the goal of "herd immunity" is not being achieved and many people who have been infected with coronavirus are being re-infected, including Prince Charles. The UK's recent strategy of lifting all restrictions on epidemic prevention is just another show of "resignation" in the face of the fifth wave of the epidemic. But it clearly hasn't been "good enough". Moreover, with a mass-infected population as a 'petri dish' for the virus, mutated and recombinant variant viruses continue to thrive here, posing a danger to people in other parts of the world. For example, the earliest variant of the coronavirus, Alpha, was generated in the UK, and the more recent recombinant variant, XE, was also generated in the UK. A recombinant variant strain is one in which a person is infected with two or more variants at the same time and the genetic material from these variants is mixed in the infected person. XE is a mixture of Omicron BA.1 and BA.2[2]. This recombinant strain is far more infectious than the current Omicron and has been classified by WHO as a new variant should be closely monitored.



(Data source: Our World in Data)

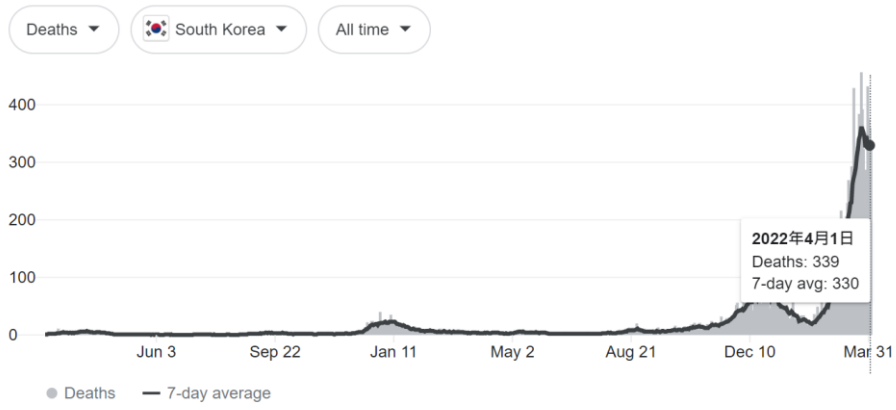
The path of fatalism is a path of no return. The powerlessness of the present is a continuation and accumulation of the powerlessness of the past. Once lie flat, it is difficult to get up again. Moreover, in a community of human destiny, a country lying flat in the face of

[2] UK Health Security Agency, SARS-CoV-2 variants of concern and variants under investigation in England Technical briefing 39, 11 March 2022, SARS-CoV-2 variants of concern and variants under investigation in England Technical briefing 39.

the epidemic not only puts its own people at risk, but also endangers other countries, including those that have served as models in the fight against the epidemic.

II. IS THE DYNAMIC ZERO-COVID POLICY REALLY UNNECESSARY?

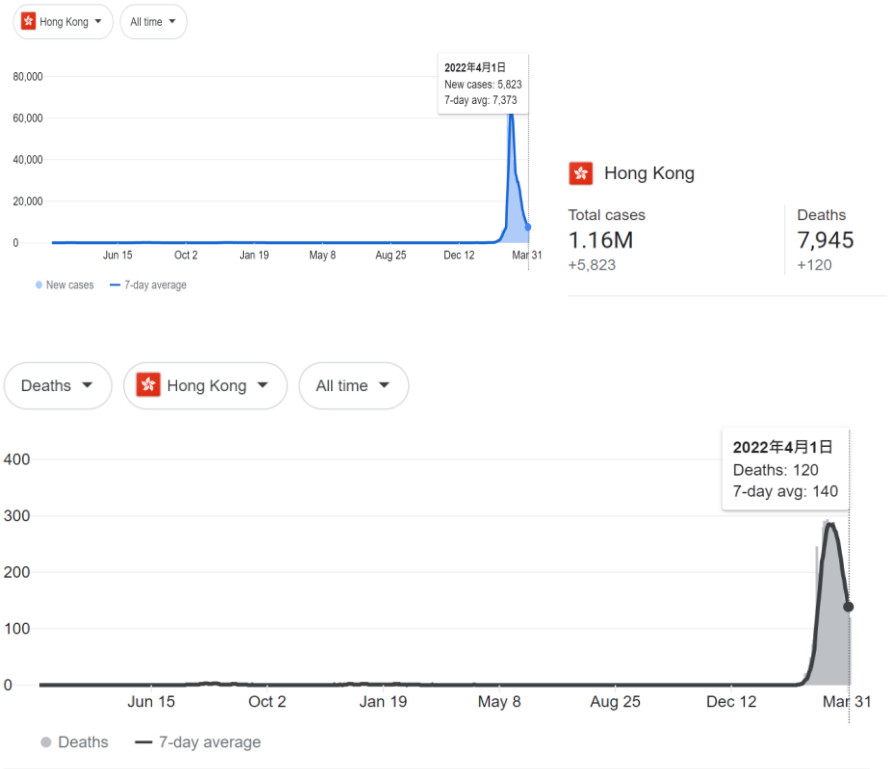
Before the emergence of Omicron variant of the coronavirus, South Korea's epidemic prevention policy was mainly a three-step process, "detection, tracking and treatment", namely tracking contacts, keeping social distance and isolating diagnosed patients, which was quite effective before the prevalence of Omicron variant. However, in order to keep up with the pace of European and American countries, the South Korean government eased the epidemic prevention restrictions at the beginning of this year. Combined with the influence of Omicron, the number of newly infected people in South Korea has remained at more than 100,000 every day since February this year, and more than 300,000 in recent weeks, reaching 620,000 on the highest day (March 17). By March 30, the total number of confirmed cases in South Korea had reached 12,774,956, which was close to a quarter of the South Korean population. The cumulative number of deaths linked to the virus reached 15855, most of which occurred during the latest outbreak of the Omicron variant. The average daily death toll in the last week was 330.



The situation of South Korean reflects: (1) first of all, South Korea has always adopted a prudent but loose precise prevention and control strategy, and the complete vaccination rate (two or more shots) ranks first in the world, but it got out of control when the Omicron variant became prevalent. This does not mean that vaccination is ineffective. Instead, it indicates that before the vaccine penetration rate reaches nearly 100%, easing epidemic control will lead to the wide spread of the virus. It will directly "find" the vulnerable people who have not been vaccinated, just as the enemy has found the weak link of the defense line, resulting in a large number of deaths in the short term. (2) Secondly, a large number of severe cases and deaths in the short term not only trigger a run on medical resources, but also lead to the rapidly grow demand on funeral services. Recently, the South Korean government asked the crematorium

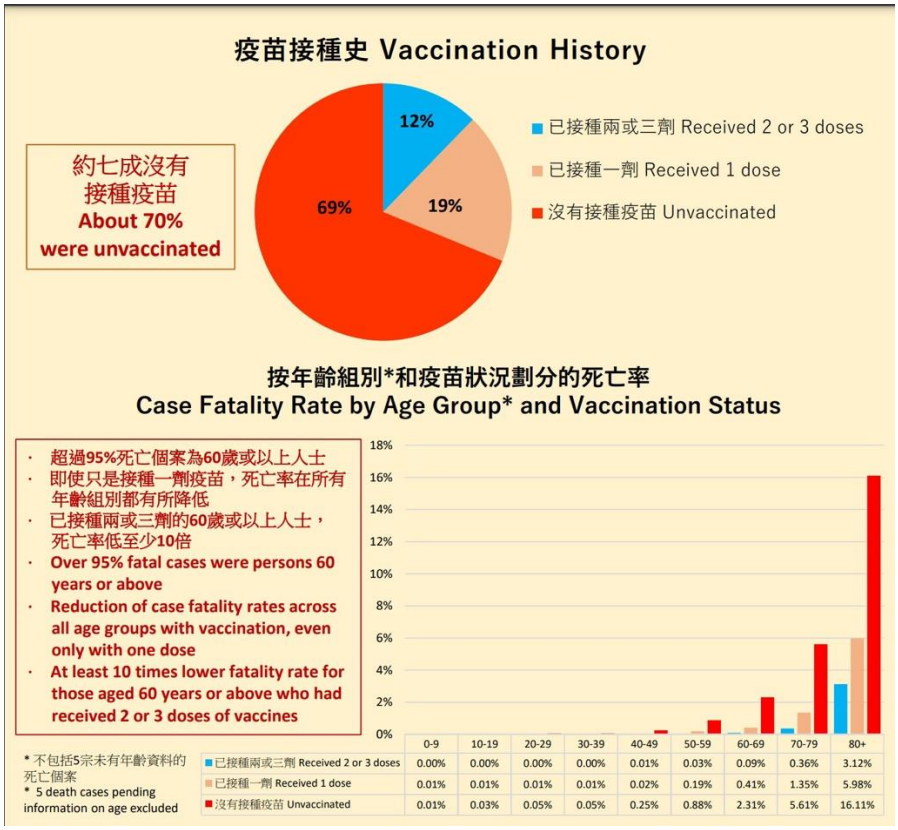
and funeral home nationwide to “expand the capacity” from cremating about 1000 bodies a day to 1400 a day, and funeral homes were also required to store more bodies. (3) The main reason for this situation is that due to the “Enlightenment” of European and American epidemic prevention policies. South Korea prematurely eased the behavioral restrictions implemented for epidemic prevention purposes, such as the limit on the number of people gathered, large-scale detection, active tracking and close connection, strict isolation of confirmed patients and asymptomatic infected persons. Epidemic prevention experts of South Korea pointed out that the premature loosen measures on epidemic prevention send wrong signal to citizens, resulting in the slack of self-discipline epidemic prevention measures and pushing medical institutions at risk.

The situation of Hong Kong Special Administrative Region is similar to South Korean. During the current fifth wave of the epidemic, Hong Kong's medical resources were overwhelmed. However, with unified deployment of the central government and the assistance of other places of China, Hong Kong has passed the most dangerous stage. In the most serious stage of the epidemic, Hong Kong experienced a tragic situation of 76341 new diagnoses in a single day (March 2) and 294 deaths in a single day (March 11), which is a shocking figure for a city with a total population of 7.59 million.



(Data source: our world in data)

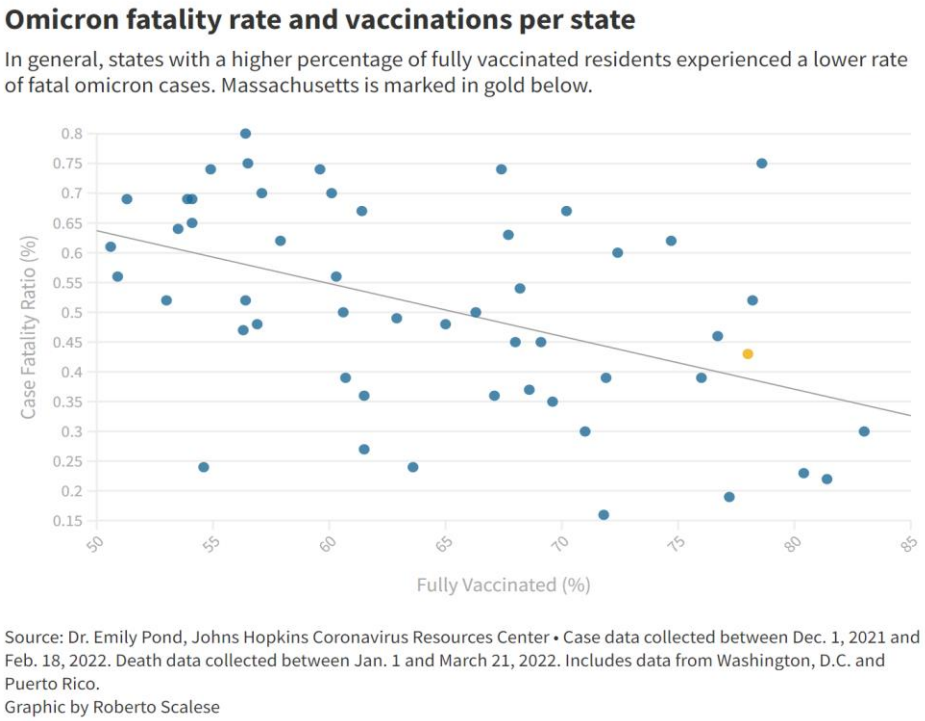
A large number of existing data shows that there is an obvious negative correlation between vaccination rate and mortality of the epidemic, that is, the higher the vaccination rate, the lower the mortality. The data of Hong Kong further proves this point. Moreover, the vaccine used is Sinovac, which is also widely used in mainland China, and Comirnaty, which is produced by Shanghai Fosun Pharm of China and BNT of German. Sinovac is an inactivated vaccine with less adverse reactions and side effects after injection while Comirnaty is an mRNA vaccine with stronger side effects. Therefore, the data of Hong Kong are of more valuable to us. According to a study by Li Ka Shing Faculty of Medicine, The University of Hong Kong, [3]whether it is Sinovac vaccine or Comirnaty vaccine, the rate of the prevention from severe cases and deaths was over 97% after the third dose of booster injection. Statistics from the Hong Kong Special Administrative Region government also show that 70% of the deaths were not vaccinated.



(Source: epidemic prevention website of the government of the Hong Kong Special Administrative Region, https://www.covidvaccine.gov.hk/pdf/death_analysis.pdf)

[3] University of Hong Kong Li Jiacheng School of medicine, Hong Kong, after the New Coronavirus fifth wave of post epidemic prospective planning, March 22, 2022, download address: https://www.Covidvaccine.gov.hk/pdf/death_analysis.pdf

But vaccines are not almighty. A study in Massachusetts shows that most of the states with the highest mortality rates in the United States have the lowest vaccination rates. However, the reverse is not necessarily true. For example, North Dakota has the lowest vaccination rate in the United States (54.6%), and the mortality rate is the lowest (0.24% of all confirmed Omicron infections). Maine has the highest vaccination rate (78.6%), but the highest mortality rate (0.75%). "Omicron is more deadly than Delta,"[4] the study said. There are many reasons for this, including vaccine brands. For example, the CDC found that people who completed the vaccination of Johnson & Johnson vaccine (a recombinant adenovirus vector-based vaccine) had higher mortality than those who injected Pfizer vaccine (mRNA vaccine).[5] However, no matter what kind of vaccine is injected, the severe and mortality are much lower than those who are not vaccinated. Therefore, a more convincing explanation may have to be found in the socio-economic conditions such as population composition, aging degree and distribution of medical resources.



(Data source: https://www.wbur.org/news/2022/03/29/omicron-surge-mortality-death-comparison)

[4] Gabrielle Emanuel, "Was omicron more deadly than it needed to be in Mass? Some experts say yes," March 29, 2022, https://www.wbur.org/news/2022/03/29/omicron-surge-mortality-death-comparison.
[5] Alexander Tin, "Omicron deaths of Johnson & Johnson recipients were double the rate of other vaccinated Americans, new data show," CBS News, March 25, 2022, https://www.cbsnews.com/news/covid-omicron-johnson-johnson-vaccine/.

Based on the above analysis, we can draw several preliminary conclusions: (1) improving the vaccine popularization rate, including strengthening the needle popularization rate, is an effective means to reduce the severe infection rate and mortality in the case of a pandemic; (2) Even in the case of high vaccine coverage, the virus cannot be treated with indulgence. The extremely high infection rate will put a very small number of unvaccinated people and a small number of people who have completed vaccination at risk. It is quite understandable that if only 1% of the population is infected, the virus is likely to find extremely vulnerable people whose autoimmune system is still insufficient to resist the virus after vaccination. However, if 10% of the population is infected, the possibility of those extremely vulnerable people being infected will greatly increase. There were no severe cases in the fifth wave of epidemic in Shanghai as of March 31, which is not only due to the vaccine, but also due to the control of the number of infected people under strict epidemic prevention measures.

III. IS LYING FLAT REALLY OKAY?

The preceding two parts manifested: objectively speaking, lying flat is not okay and will make things worse. Under different values, however, different countries and regions have different subjective judgments about what is fine or bad.

The estimation of costs and benefits actually depends on values, especially for constitutional rights. What kind of constitutional rights we value depends on the values of society because there is no market price for them.

I have translated *The Future of Law and Economics* written by Professor Calabresi of Yale Law School, who is also a U.S federal appeals court justice. He pointed out in this book that the reason why the society is willing to invest more in saving a person in an extremely danger condition, e.g., the maniac trying to cross the Atlantic in a small sailboat, than in avoiding constant disasters causing more death is obvious. The former has a very high degree of visibility: it can superficially justify the proposition that life is priceless and win applause and votes for the government. The latter does not have such visibility: if you succeed in prevention and the disaster does not happen, people will question you for arbitrarily wasting taxpayers' money; if you fail in prevention and the disaster does happen, the consequences will be the same as if you did not invest in prevention at all. So politicians have no gain from this sort of thing.

Thomas C. Schelling, winner of the 2005 Nobel Prize in economics, wrote *The Life You Save May Be Your Own in 1968.* In this article, he introduced the concepts of identified lives and statistical lives. It is a common phenomenon in the field of public health that people tend to save a story-fruitful, image-vivid life at all cost rather than spend less to improve public health and medical services for imageless population possessing only statistical significance. This phenomenon is also called “Identifiability Bias”. An obvious example is Ipilimumab used to treat melanoma, an NHS-covered prescription medicine in the UK. It costs £42,200 per patient to extend their life by one year using this medicine. At the same time, however, the UK, under the influence of conservative neoliberal ideology, has made drastic budget cuts to the

NHS, resulting in an inability to provide universal testing and prevention and control in the wake of the outbreak of the Covid-19 pandemic.

The values embodied in our Constitution are significantly different from those of capitalist countries, where the objective well-being of the people, rather than subjective rights, is the primary goal served by the Party and the Chinese government (although this does not mean that the subjective rights of citizens are not protected). Established in Article 21 of the Constitution, “The protection of the people’s health” is one of the fundamental tasks of China, and the positive obligations and corresponding powers of the state in the prevention and control of the pandemic are very important elements of our socialist Constitution. That is why China has taken active and decisive measures to prevent and control the pandemic from the onset, always insisted on the policy of dynamic clearing and made every effort to avoid the spread of the virus to protect the life and health of every citizen. This pandemic prevention policy has been remarkably effective, keeping the number of confirmed cases in China within 100,000 for a long time after the first wave of the pandemic. Even though there was a significant increase in the fifth wave of the epidemic, the cumulative number of confirmed cases in mainland China (more than 230,000) was even lower than the number of confirmed cases on a single day in the United States, India, Brazil, Germany, and even in South Korea during the peak of the pandemic. For example, there were 1.01 million cases in the United States on January 3, 2022, more than 410,000 cases in India on May 6, 2021, and more than 280,000 cases in Brazil on February 3, 2022. The cumulative number of deaths from the novel coronavirus in China is about 4,600, only slightly higher than the single-day death toll in the United States on January 27, 2021 (4,102). China's economy also maintained its growth momentum during the pandemic, with GDP growth of 8.1% in 2021 and significant growth in the value of inbound trade. Although macroeconomic data cannot hide the impact on many small and medium-sized enterprises and individual entrepreneurs, the central and local governments have begun to introduce a variety of policies to help these impacted enterprises and individuals to tide over the difficulties, including rent relief, preferential interest rates on loans, tax breaks, and so on.

The different impact of an identified life versus a statistical life on the average person was cleverly exploited by the media, as was starkly demonstrated in three stories in the Chinese website of *New York Times*. *25 Days That Changed the World: How Covid-19 Slipped China’s Grasp*, published on December 30, 2020, wrote that “China ultimately got control, both of the virus and of the narrative surrounding it. Today, the Chinese economy is roaring and some experts are asking whether the pandemic has tipped the global balance of power toward Beijing”. While European countries and the United States were suffering both from the pandemic and their troubled economy, China not only managed to contain the pandemic but also managed to achieve sustained economic growth. This commentary expressed disbelief and confusion in the face of unquestionable statistical data.

On January 7, 2022, when Coronavirus Delta variant ravaged Xi’an, *China’s Latest Lockdown Shows Stubborn Resolve on Zero-Covid* published in *New York Times*, questioned whether China's measures to combat the pandemic were too costly by telling the stories of specific, ordinary people with vivid images. Several of the incidents mentioned within this

article were also available to us in other media, which caused a huge public outcry at the time. One is "the vast health code system used to track people and enforce quarantines and lockdowns crashed because it couldn't handle the traffic, making it hard for residents to access public hospitals or complete daily routines like regular Covid testing'', the other is "many were incensed when a woman in the city, eight months pregnant, lost her baby after she was made to wait for hours at a hospital because she was unable to prove she did not have Covid-19". These incidents do expose certain aspects of the pandemic prevention requiring improvement, but they are not the corollaries of the Zero-Covid policy. On the contrary, these incidents are entirely avoidable while pursing the goal of Zero-Covid. By describing such incidents as the price of Zero-Covid policy, the article is clearly intended to set the pace and make readers resent the Zero-Covid policy. However, the article also had to acknowledge that the local government did respond quickly to the public opinion by writing that "amid the outcry, the government this week created special 'green channels' for pregnant women and patients with 'acute and critical illnesses' to get medical care more easily".

On March 30, 2022, this media published another commentary, *Shanghai's Lockdown Tests Covid-Zero Policy, and People's Limits*. This commentary told a very familiar tragedy to the Chinese people that "Last week, a nurse suffered an asthma attack but couldn't get help from the emergency department at the hospital where she worked because it was closed for Covid disinfection. Her family rushed her to another hospital but she died, according to a statement from Shanghai East Hospital, her employer. On Friday, officials from Shanghai's health commission expressed condolences to the nurse's family. They urged hospitals to speed up infection screening, contact tracing and disinfection protocols to minimize disruptions to normal medical services".

This event does sound an alarm to the decision makers of pandemic prevention: the dynamic clearing is to avoid a run on medical resources caused by mass infections, but some artificial reasons in the process of implementing this policy have led to the exclusive use of medical resources by the pandemic itself, which makes other critical emergencies not receive timely and effective treatment. This is contrary to the original intention of the policy. But pointing the finger at the Zero-Covid policy again is clearly to exploit the cognitive bias due to people's inability to empathize with the statistical life. Such narratives can easily cater to the mindset of people who are already filled with resentment for the inconvenience caused by the pandemic prevention measures to their own lives, and thus may become self-fulfilling prophecies. Whether all people will be united or public discontent will be intensified depends on how the government guides the public opinion. Of course, adjustments at the policy implementation level are still necessary without abandoning the goal of Zero-Covid. In particular, there is a need to correct the target-oriented responsibility system whose only assessment criterion is Zero-Covid, so as to avoid bureaucratic tendency to ignore the needs of people's livelihood and basic rights beyond the pandemic.

CONCLUSION

There is no one-size-fits-all solution, and we all make decisions with risks and uncertainties. For public health policymakers of China, abandoning the current Zero-Covid policy can only be the last choice when there are really no other choices. “Lie-flat” policy is the easiest thing to do, but once we “lie-flat”, we show our “resignation”. If that day comes, they would say: **we did our best. All of our efforts have prevented hundreds of thousands, even millions of people from dying of infection. They will not be the protagonists of sensational stories, but the dead will be; nor will they know that they’ve escaped from** disaster**, because they just have avoided one. They even will not be counted in the infected numbers, because those numbers do not reflect the deaths successfully avoided. They are real lives who could be parents, siblings or children of yours or mine.** Now, as the situation has changed, it's time to adjust the pandemic prevention policy and turn a new page together.

But that day has not come yet!

EFFECTIVE ANTI-PIRACY IN VIETNAM: A JOURNEY THROUGH SITE BLOCKING

Jonathan Lee Xue Han*

Abstract: The dawn of the Internet has created significant challenges to protecting copyrighted materials from piracy. In the past, copyright protection was mainly concerned with the threat of infringement from the sale of counterfeit goods, like pirated CDs and optical media. However, the Internet has now allowed for online piracy where infringing materials can be accessed online or copied with even greater ease. Vietnam has recently become a jurisdiction that is a hotbed for online piracy and copyright infringement globally. This is largely because Vietnam's current statutory and regulatory regime fail to effectively create an effective anti-piracy regime in accordance with its WTO TRIPS obligations. Furthermore, Vietnam's recent accession of various treaties like the CPTPP and WCT further galvanizes a need for change in Vietnam's intellectual property regime. Thus far, Vietnam's attempts at fashioning an effective site-blocking regime have not succeeded. This paper will look at other effective site-blocking regimes, namely Singapore, India, and France, to look prospectively at what may be possible in Vietnam.

Keywords: Vietnam; Copyright; TRIPS; CPTPP; Site-blocking

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INTRODUCTION

The dawn of the internet has created significant challenges to the protection of copyrighted materials from piracy.[1] In the past, copyright protection was mostly concerned with the threat of infringement from the sale of counterfeit goods, like pirated CDs and optical media.[2] However, the internet has now allowed for a form of online piracy where infringing materials can be accessed online or copied with an easy click of a button or tap of a screen.[3] One of the most promising attempts at addressing online piracy is the practice of site blocking.[4] While not always the case, numerous nations have outlined a framework for site blocking as a part of safe harbor provisions.[5] Broadly, these safe harbor provisions broker a compromise between internet service providers (ISPs) and rights holders, by indemnifying ISPs in exchange for allowing rights-holders to get ISPs to block domestic access to sites that are known to host or distribute large amounts of pirated material.[6] While effective, many of these measures have still have not reached many jurisdictions in Asia which have growing numbers of their population joining the internet. There is no place where this is truer than Vietnam.

Vietnam has one of the fastest growing online piracy cultures in Asia and already has many online users that openly admit to frequently using infringing sites.[7] Moreover, it seems that the combination of unclear laws, poor enforcement mechanisms, and restricted market access has resulted in a weak copyright regime that is susceptible to rampant online infringement.[8] The Office of the United States Trade Representative (USTR), recognizing the threat that Vietnam poses to intellectual property (IP) protection and enforcement among U.S. trading partners, elevated Vietnam to the watch list.[9]

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[1] Advisory Committee on Enforcement, Study on IP Enforcement Measures, Especially Anti-piracy Measures in the Digital Environment, WIPO, July 23, 2019.
[2] Id. at 1.
[3] Id. at 1.
[4] Justin Hughes, Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy? Hearing Before the United States Senate Judiciary Committee Subcommittee on Intellectual Property, 10 March 2020.
[5] Id. at 4.
[6] Nigel Cory, The Normalization of Website Blocking Around the World in the Fight Against Piracy Online, June 12, 2018, https://itif.org/publications/2018/06/12/normalization-website-blocking-around-world-fight-against-piracy-online/.
[7] New survey shows Vietnam among highest in online piracy in Southeast Asia., AVIA, May 17, 2021, https://avia.org/new-survey-shows-vietnam-among-highest-in-online-piracy-in-southeast-asia/.
[8] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, IIPA,106 (January 28, 2021).
[9] USTR, 2021 Special 301 Report, USTR, 84; IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 106; See also USTR, USTR Releases Annual Special 301 Report on Intellectual Property Protection and Review of Notorious Markets for Counterfeiting and Piracy, 29 April 2020, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/ustr-releases-annual-special-301-report-intellectual-property-protection-and-review-notorious ("The Special 301 Report identifies trading partners that do not adequately or effectively protect and enforce intellectual property (IP) rights or otherwise deny market access to U.S. innovators and creators that rely on protection of their IP rights… These trading partners will be the subject of increased bilateral engagement with USTR to address IP concerns. Over the coming weeks, USTR will review the developments against the benchmarks established in the Special 301 action plans for those countries. For countries failing to address U.S. concerns, USTR will take appropriate actions, which may include enforcement actions under Section 301 of the Trade Act or pursuant to World Trade Organization (WTO) or other trade agreement dispute settlement procedures.)

Moreover, Vietnam is a member of the World Trade Organization (WTO)[10] and a signatory to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[11] The TRIPS agreement requires Vietnam to "criminalize copyright piracy on a commercial scale"[12] and "make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right".[13] This means that Vietnam is legally obligated to ensure that there are available enforcement procedures for effective action against all forms of copyright infringement covered in the treaty[14], including the kind of piracy happening online in Vietnam daily. However, it seems like Vietnam has yet to do so.[15] Further, Vietnam's recent accession of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[16] and the World Intellectual Property Organization Copyright Treaty (WCT)[17] further galvanize and impose obligations for effective copyright enforcement on Vietnam.[18] Hence, the topic of effective Vietnamese measures against online piracy is becoming increasingly relevant. The international experience has shown that many nations with a variety of legal traditions have managed to create effective copyright regimes that have aspects of site blocking.[19]

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[10] World Trade Organization, Members and Observers, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm/.

[11] World Trade Organization, Frequently asked questions about TRIPS [trade-related aspects of intellectual property rights] in the WTO, https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who'sSigned/.

[12] TRIPS Agreement, Part III, Section 5, Article 61, https://www.wto.org/english/docs_e/legal_e/31bis_trips_05_e.htm#5/.

[13] TRIPS Agreement, Part III, Section 1, Article 41, https://www.wto.org/english/docs_e/legal_e/31bis_trips_05_e.htm#1/.

[14] WIPO Lex, WIPO Copyright Treaty, Article 14(2).

[15] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, IIPA,110, 112 (January 28, 2021).

[16] Government of New Zealand, Viet Nam seventh nation to ratify CPTPP, 15 November 2018, https://www.beehive.govt.nz/release/viet-nam-seventh-nation-ratify-cptpp/.

[17] Vietnam becomes signatory to WIPO Copyright Treaty, People's Army Newspaper, 25 November 2021, https://en.qdnd.vn/foreign-affairs/bilateral-relations/vietnam-becomes-signatory-to-wipo-copyright-treaty-536158/; See also WIPO Lex, Contracting Parties > WIPO Copyright Treaty, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16/.

[18] See CPTPP, Chapter 18, Article 18.74, page 44-47, https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/18.-Intellectual-Property-Chapter.pdf/; WIPO Lex, WIPO Copyright Treaty, Article 14(2).

[19] Nigel Cory, supra note 6; See Australia, Copyright Amendment (Online Infringement) Act 2015, Section 115A; United Kingdom, Copyright, Designs and Patents Act 1988, Section 97A; EU 2001 Information Society Directive, Article 8(3); Singapore, Copyright Act (Chapter 63 of Singapore Laws), Article 193DDA(1)(b) (revised 31st January 2006). See also Hugh Stephens, Disabling Access to Large-Scale Pirate Sites (Site Blocking)—It Works!, Hugh Stephens Blog, 18 April 2017, https://hughstephensblog.net/2017/04/18/disabling-access-to-large-scale-pirate-sites-site-blocking-it-works/;

Furthermore, the case of India[20] and Singapore[21], show that even in Asia site blocking is a viable and effective means of containing online piracy. Thus, this paper through the study and analysis of site blocking regimes in Singapore, India, and France shall show that a clear and effective Vietnamese site blocking regime which solves online piracy and fulfils treaty obligations, is possible.

Part II of this paper describes the practice of site blocking generally. Part III of this paper analyzes and looks at Singapore's site blocking regime as an example of how a country in the same region as Vietnam has tackled the issue of site blocking via statute. Part IV of the paper will look at India's common law site blocking regime and discusses commonalities in various site blocking regimes. Part V of the paper looks at the French civil law site blocking regime given Vietnam's civil law system. Finally, Part VI will look at what an effective site blocking regime might look like in Vietnam.

I. SITE BLOCKING: AN OVERVIEW

The age of the internet has enabled electronic copying and sharing of content across many geographic and jurisdictional borders.[22] This often can include protected copyrighted material.[23] However, IP laws and regulations are usually limited jurisdictionally to the countries in which they are enacted, while the domain of the internet is borderless.[24] Thus, site blocking is generally seen as a response to limitations faced by domestic copyright regimes against a borderless internet.[25] Site blocking operates by allowing rights-holders to get internet service providers (ISPs) to block domestic access to sites that are known to host or distribute large amounts of pirated or infringing material.[26] Research has generally shown that efficient and prolific site blocking leads to

[20] Indian courts have been ordering ISPs to block pirate websites to protect new releases of Indian films for many years. See Delhi HC restrains 30 torrent sites from hosting copyrighted content, orders ISPs to block them, FINANCIAL EXPRESS, April 11, 2019, https://www.financialexpress.com/india-news/delhi-hc-restrains-30-torrent-sites-from-hosting-copyrighted-content-orders-isps-to-block-them/1545480/; Bill Toulas, ISPs in India Ordered to Block Pirate Bay, Torrentz2, YTS, and 1337x, TECHNADU, April 12, 2019, https://www.technadu.com/isps-india-ordered-block-pirate-bay-torrentz2-yts-1337x/64592/; Javed Anwer, 830 more websites blocked in India, many torrent links in list, INDIA TODAY, August 25, 2016 ("Blocking of hundreds of URLs at the behest of film producers is not new in India. It has become almost routine to for film producers to approach court before release of a film and take John Doe orders, leading to the blocking of the websites. Not only torrent sites have been blocked under such orders but also image hosts, file hosts and websites that share URLs"), https://www.indiatoday.in/technology/news/story/830-more-websites-blocked-in-india-many-torrent-links-in-list-337177-2016-08-25; Anupam Saxena, ISP Wise List Of Blocked Sites #IndiaBlocks, MEDIANAMA, May 17, 2012, https://www.medianama.com/2012/05/223-isp-wise-list-of-blocked-sites-indiablocks/.

[21] Irene Tham, Solarmovie.ph is first piracy website to be blocked under amended Copyright Act, The Straits Times, 16 February 2016, https://www.straitstimes.com/singapore/solarmovieph-is-first-piracy-website-to-be-blocked-under-amended-copyright-act/ ; See also Motion Picture Association Asia Pacific, Singapore allows dynamic site blocking in landmark court ruling – Any Web address linking to blocked piracy sites can now be blocked as well, MPA APAC In The News, 19 July 2018, ("A spokesman for the Intellectual Property Office of Singapore said: "We are glad to see rights holders utili[z]ing the legal framework that we have put in place to protect their copyright works.""), https://www.mpa-apac.org/in_the_news/singapore-allows-dynamic-site-blocking-in-landmark-court-ruling-any-web-address-linking-to-blocked-piracy-sites-can-now-be-blocked-as-well/.

[22] Nigel Cory, supra note 6.

[23] Id. at 22.

[24] Id. at 22.

[25] Nigel Cory, supra note 6.

[26] European Union Intellectual Property Office, Study on Dynamic Blocking Injunctions in the European Union, 16, March 2021.

real world decreases in total online piracy and increases in the use of paid legal streaming services.[27] Therefore, it should not be surprising that the creation of a domestic site blocking regime has been embraced in many jurisdictions, including Australia, many parts of the EU, Singapore, India, and the United Kingdom.[28]

However, the creation of a site blocking regime is not always so simple. Firstly, countries looking to implement such a regime must ensure that it only targets sites that can be identified as embracing online piracy or infringement.[29] This is difficult because infringing content is being posted online everyday by end users on a myriad of legitimate and illegitimate sites. If one does not adequately identify which sites should be blocked for embracing piracy, you run the risk of blocking even legitimate sites and stifling the internet, i.e. "over blocking".[30] Secondly, the reality of online practice is that when infringing sites are blocked or taken down, infringing sites attempt to circumvent such orders by changing domain names, redirecting traffic, or having dynamic IP addresses.[31] This creates a situation where the original blocking order is essentially rendered useless and rights holders would have to begin the process all over again for every slight change in domain name or IP address. Hence, to ensure that site blocking regimes remain effective, courts in the France, Singapore, and India, have allowed for the creation of dynamic injunctions.[32] These dynamic injunctions allow for the blocking of IP addresses and multiple domain names to account for the common practice of redirecting or changing domain names.[33] These two issues have created similarities among countries with effective site blocking regimes around clear legal standards targeting online piracy and responsive enforcement measures to keep up with infringers.

While site blocking measures are effective at reducing traffic to infringing sites[34], numerous concerns in various jurisdictions have been raised about site blocking's ability to stifle free speech[35], strangle internet freedom[36], and the proportionality of such responses to internet piracy.[37] Hence, understanding how other Asian site blocking

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[27] Brett Danaher et al., Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior, 16-19, 18 April 2016. https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2766795_code986726.pdf?abstractid=2766795&mirid=1/; Motion Picture Association, Measuring the Effect of Piracy Website Blocking in Australia on Consumer Behavior: December 2018, 6-8, January 2020, https://www.mpa-apac.org/wp-content/uploads/2020/02/Australia-Site-Blocking-Summary-January-2020.pdf/.

[28] Justin Hughes, In response to questions from Senators Tillis, Coons, and Blumenthal, Senate Judiciary Committee / Intellectual Property Subcommittee, 7, 14 April 2020.

[29] Justin Hughes, supra note 28 at 9.

[30] Peter Carstairs, The Inevitable Actors: An Analysis of Australia's Recent Anti-piracy Website Blocking Laws, Their Balancing of Rights and Overall Effectiveness, (2021) 31 AIPJ 280, 286.

[31] Victor Loh, Court order makes it easier for copyright owners to curb access to piracy websites, https://www.todayonline.com/singapore/court-order-makes-it-easier-copyright-owners-curb-access-piracy-websites/.

[32] Justin Hughes, supra note 28 at 11-12.

[33] Id. at 32.

[34] Peter Carstairs, supra note 30 at 305; Brett Danaher et al., supra note 27 at 16-19; Motion Picture Association, Measuring the Effect of Piracy Website Blocking in Australia on Consumer Behavior: December 2018, supra note 27 at 6-8.

[35] Peter Carstairs, supra note 30 at 300; Grace Espinosa, Internet Piracy: Is Protecting Intellectual Property Worth Government Censorship?, 18 Tex. Wesleyan L. Rev. 309, 332-34 (2011).

[36] [CS(COMM) 724/2017 & I.As. 12269/2017, 12271/2017, 6985/2018, 8949/2018 AND 16781/2018], Decision of 10 April 2019 at ¶55-56; See also Nigel Cory, India and Website Blocking: Courts Allow Dynamic Injunctions to Fight Digital Piracy, May 29, 2019, https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital/.

[37] Peter Carstairs, supra note 30 at 287.

regimes, like India and Singapore, have attempted to create an effective site blocking regime and balance the associated concerns can be informative in ascertaining what site blocking might need to look like in Vietnam.

II. A STATUTORY FRAMEWORK: SITE BLOCKING IN SINGAPORE

Less than a three-hour plane ride away from Vietnam's capital Hanoi lies Singapore. Singapore inherited its common law tradition from the British and shares membership in the Association of South-East Asian Nations (ASEAN) with Vietnam.[38] Besides geographic proximity, Singapore also happens to be a party to many of the treaties that Vietnam has signed or is planning to sign, including the WCT[39] and the CPTPP[40]. These treaties are relevant because they stipulate that signatory nations have a responsibility to ensure effective enforcement mechanisms around all forms of copyright infringement covered by the WCT, which likely includes online piracy.[41] Further, both Singapore and Vietnam have been parties to numerous ASEAN treaties, including the ASEAN Framework Agreement on Intellectual Property Cooperation.[42] The ASEAN Framework Agreement on Intellectual Property Cooperation requires signatories to cooperate in areas around intellectual property legislation, particularly where it involves the implementation of international intellectual property treaties like the WCT.[43] Thus, Singapore's current site blocking regime is likely going to be relevant when Vietnam's government considers what should be implemented in Vietnam. In short, because of Singapore's geographic proximity and many shared multilateral treaties, a look at Singapore's site blocking regime can be informative and useful.

A. Overview of Statutory Site Blocking in Singapore

The amendment to Singapore's Copyright Act which instituted its site blocking regime was passed without much opposition[44] in 2014.[45] The goal of Singapore's site blocking regime is to actively combat online piracy[46] and "empower rights owners to

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[38] ASEAN, ASEAN Member States, https://asean.org/about-asean/member-states/.

[39] WIPO Lex, WIPO-Administered Treaties, Contracting Parties WIPO Copyright Treaty, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16/ .

[40] Singapore Ministry of Trade and Industry, Singapore ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 19 July 2018, https://www.mti.gov.sg/-/media/MTI/improving-trade/multilateral-and-regional-forums/CPTPP/cptpp-ratification---19-july-2018.pdf/.

[41] WIPO Lex, WIPO Copyright Treaty, Article 14(2).

[42] ASEAN, ASEAN Framework Agreement on Intellectual Property Cooperation, 15 December 1995, https://www.aseanip.org/Portals/0/PDF/ASEANFrameworkAgreementonIntellectualPropertyCooperation.pdf/.

[43] ASEAN, supra note 42 at Article 3(3)

[44] There was little to no debate recorded in parliament surrounding the amendments to the Copyright Act creating the site blocking regime. See Parliament of Singapore, Second Reading of Copyright (Amendment) Bill 2014, 7 July 2014, http://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-100/.Parliament of Singapore, Third Reading of Copyright (Amendment) Bill 2014, 8 July 2014, http://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-337/.

[45] Ashley Chia, Amendments to Copyright Act aim to stop online piracy, Today Online, July 08, 2014, https://www.todayonline.com/singapore/amendments-copyright-act-aim-stop-online-piracy/.

[46] Parliament of Singapore, Second Reading of Copyright (Amendment) Bill 2014, supra note 44, (Senior Minister of State for Law (Ms Indranee Rajah): "The prevalence of online piracy in Singapore turns customers away from legitimate content and adversely affects Singapore's creative sector. It can also undermine our reputation as a society that respects the protection of intellectual property… We, therefore, need to take stronger measures against online piracy.").

more effectively disable access to sites that flagrantly infringe copyright".[47] The main statutory provision instituting Singapore's site blocking is Article 193DDA. It works by allowing for a copyright holder or exclusive licensee to petition the court for a "blocking order" or injunction directing an ISP to block access to a "flagrantly infringing online location" (FIOL).[48] To obtain a site blocking order the copyright holder or exclusive licensee would have to prove that 1) the website has been used or is being used to commit or facilitate copyright infringement and 2) the website is a "flagrantly infringing online location".[49] In Singapore, a "flagrantly infringing online location" is defined as a website which "flagrantly infringes or facilitates infringement of copyright materials".[50] In determining whether an online location is a "flagrantly infringing online location", courts consider non-exhaustive factors as set out in the statute:[51]

> (a) whether the primary purpose of the online location is to commit or facilitate copyright infringement;
> (b) whether the online location makes available or contains directories, indexes or categories of the means to commit or facilitate copyright infringement;
> (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
> (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
> (e) whether the online location contains guides or instructions to circumvent measures, or any order of any court, that disables access to the online location on the ground of or related to copyright infringement;
> (f) the volume of traffic at or frequency of access to the online location.[52]

Considering Singapore's Copyright Act has historically taken inspiration from the Australian and UK's Copyright Acts,[53] it should not be surprising that the factors listed and the process of obtaining a site blocking order is similar to the Australian site blocking regime, which follows a similar two-step criterion and factor test.[54] The factors stated above help determine if a site is a FIOL.[55] They ensure that sites largely operated for

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[47] Parliament of Singapore, Second Reading of Copyright (Amendment) Bill 2014, supra note 44.
[48] Article 193DDA, Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006). See also Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, https://sso.agc.gov.sg/Bills-Supp/16-2014/Published/20140529?DocDate=20140529#xn-.
[49] Article 193DDA(1)(b), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006). See also Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, supra note 48.
[50] Parliament of Singapore, supra note 49.
[51] Id. at 50.
[52] Article 193DDA(2), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006).
[53] David Tan, Copyright reform and what it means for your wedding photos, Straits Times, 17 September 2021, https://www.straitstimes.com/opinion/copyright-reform-and-what-it-means-for-your-wedding-photos/.
[54] Peter Carstairs, supra note 30 at 284-85. See also Australia, Copyright Amendment (Online Infringement) Act (2018), Section 115A; Justin Hughes, supra note 28 at 11 & 42 (noting the similarities in the Australian and Singaporean site blocking statutes).
[55] Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, supra note 48.

legitimate purposes are excluded[56] and ensure that the site blocking regime is specific and targeted at sites that "flagrantly" disregard copyright.[57] In essence, sites with a legitimate purpose with only incidental infringing content or piracy are not the targets of the law.[58] The factors also ensure that courts consider the proportionality of site blocking and ask, particularly in the case of the last factor around traffic/access, if blocking is appropriate given the circumstances and in the public interest.[59]

While seemingly well crafted, the statute still does not directly address how the site blocking orders would remain flexible amidst the common online practice of redirects, dynamic IP addresses, and changing domain names. To understand how Singapore came to have an effective site blocking regime that not only clearly defines infringing online locations but also allows for responsive enforcement, we look to the case of *Disney Enterprises, Inc v M1 Ltd*.

B. Disney Enterprises, Inc v M1 Ltd: Statutory Site Blocking in Practice and Dynamic Injunctions

In Disney Enterprises, Inc v M1 Ltd, Disney, Paramount, and other rights holders sued major Singaporean ISPs seeking site blocking orders under Article 193DDA.[60] The plaintiff sought blocking orders concerning 53 sites or online locations which were eventually found to be "fragrantly infringing online locations" (FIOLs).[61] Among these 53 sites included notorious piracy site Kickass Torrents, which has also been subject to robust US enforcement.[62] Notably, by applying the factors stated above, Justice Lee found the mere making available of infringing content for streaming was sufficient to classify a site as a FIOL.[63] Furthermore, because the plaintiffs in the case sought a blocking order that would require ISPs to also block later discovered domain names and IP addresses that provide access to the same FIOLs, the court effectively established the need for dynamic injunctions as a part of a robust site blocking regime.[64]

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[56] Peter Carstairs, supra note 30 at 280, 291.

[57] Peter Carstairs, supra note 30 at 291-92 (stating that the primary purpose language in the Australian statute creates a high threshold inevitably leading to a site blocking regime that is specific and targeted at flagrant infringing sites). See also Parliament of Australia, Explanatory Statement for the Copyright Amendment (Online Infringement) Bill 2018, ¶ 10; Australian Department of Communication and the Arts, Regulation Impact Statement (2018), ¶83.

[58] Peter Carstairs, supra note 30 at 291.

[59] Peter Carstairs, supra note 30 at 293.

[60] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 1-4.

[61] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 24.

[62] US DOJ Office of Public Affairs, U.S. Authorities Charge Owner of Most-Visited Illegal File-Sharing Website with Copyright Infringement, 20 July 2016, https://www.justice.gov/opa/pr/us-authorities-charge-owner-most-visited-illegal-file-sharing-website-copyright-infringement/. See also Nick Statt, KickassTorrents domains seized after alleged owner is arrested in Poland, 20 July 2016, The Verge, https://www.theverge.com/2016/7/20/12243592/kickass-torrents-artem-vaulin-founder-arrested-domains-seized/.

[63] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 23- ("I was satisfied based on a consideration of all of the factors listed under s 193DDA (2) that the 53 websites were FIOLs. Hence, the requirement under s 193DDA(1)(b) was met. All of the 53 websites were one of the following: …(b) A streaming target website: a website which allows end-users to directly stream copyrighted content. These sites directly make available the films to the public and thereby both infringe and facilitate infringement of copyright")

[64] Victor Loh, supra note 31.

In his decision, Justice Lee stated that a "dynamic injunction anticipates and seeks to counteract circumventive measures that may be taken by owners or operators of the FIOLs."[65] These measures include changes to domain names, IP addresses, or URL redirects.[66] To illustrate this Justice Lee pointed to how multiple domain names, URLs, and IP addresses could be associated with one FIOL and showed how over the course of the litigation some FIOLs had even changed their domain names.[67] Hence, Justice Lee stated that "the dynamic injunction is necessary to ensure that the [original] injunction operated effectively to reduce further harm to the plaintiffs".[68] He went on to further state that "Without a continuing obligation to block additional domain names, URLs and/or IP addresses upon being informed of such sites, it is unlikely that there would be effective disabling of access to the 53 FIOLs".[69] In short, the court found that dynamic injunctions should be a natural extension of any existing statutory site blocking regime[70] and are necessary to ensure the effectiveness of site blocking.[71]

This ruling also established the practice and precedent for dynamic site blocking.[72] Following the ruling, plaintiffs filing for blocking orders may file additional affidavits stating why a new website or domain name falls within the scope of an existing blocking order; the additional affidavits are then forwarded to ISPs, who can either extend the blocking order or dispute the merits of extending the blocking order.[73] This system creates a structure that allows for a responsive system of injunctions that can keep pace with the circumventive methods of the internet. Hence, this ruling coupled with the clarity offered by Article 193DDA of Singapore's Copyright Act, provides for an effective site blocking regime that is both clear and responsive. As shown later, Singapore's rather simple yet effective site blocking regime leaves much to be admired and inspired other jurisdictions in implementing effective site blocking regimes.

III. COMING TO THE SAME CONCLUSION: COMMON LAW SITE BLOCKING IN INDIA

While Indian copyright legislation does provide for civil and criminal penalties like many other advanced nations[74], site blocking in India is largely an operation of common

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[65] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 35.

[66] Id. at 65, ("This would include measures taken to change the domain name, URL and/or IP address providing access to the FIOL").

[67] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 35-6 ("Owners or operators of FIOLs are able to take measures which circumvent existing blocking orders since it is possible for a single FIOL to be accessed via multiple domain names, URLs and/or IP addresses. As an illustrations of the schedule to the plaintiffs' application sought to block the FQDNs which provide access to the FIOL known as "series9". Multiple domain names, URLs and IP addresses were associated with the "series9" FIOL… For example, the primary domain name for the FIOL "xmovies8" has since been changed from "xmovies8.es" to "xmovies8.nu". As the domain name "xmovies8.nu" did not exist at the time of the application and was not listed under the plaintiffs' schedule")

[68] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 42.

[69] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 42.

[70] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 38.

[71] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 42.

[72] Justin Hughes, supra note 28 at 11; See also Victor Loh, supra note 31.

[73] Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 45. See also Justin Hughes, supra note 28 at 11-12.

[74] India Copyright Act, 1957, No. 14, § 55, Acts of Parliament, 1957 (India), India Copyright Act, 1957, No. 14, §§ 63, 63A, Acts of Parliament, 1957 (India). See also Arpan Banerjee, Copyright Piracy and the Indian Film Industry: A "Realist" Assessment, 34 Cardozo Arts & Ent. L.J. 609, 661 (2016).

law.[75] India possesses a billion-dollar film industry[76] that is dependent on the protection of intellectual property to grow and remain profitable.[77] The existence of a site blocking regime has been recognized as an area of success for copyright law in India, where there seems to be a prevalent culture of online piracy.[78] Indian courts have been issuing site blocking orders for years and become a part of addressing online piracy.[79] However, unlike Singapore, India did not arrive at its site blocking regime instantly. It was only through numerous judgments did India largely feel its way towards clear legal standards which identify infringing online locations and subsequently responsive enforcement mechanisms. Throughout this process, various Indian courts have had to address concerns around site blocking.[80] Therefore, India's experience in common law site blocking can prove instructive in addressing concerns around site blocking and understanding what makes an effective site blocking regime.

A. Overview of Site Blocking in India

Website blocking orders from Indian courts have become a common and reliable means of copyright enforcement.[81] In fact in certain industries, like the film industry, there has been a noticeable trend towards pre-emptive site blocking injunctions against infringing sites since 2011.[82] Because India's common law site blocking regime was largely developed through various judgements,[83] the evolution of India's site blocking regime has been mostly a patchwork process. Initially, the broad wording of some site blocking orders led to ISPs blocking entire websites[84] and some "over-blocking".[85] This was eventually corrected by another case where the court limited site blocking orders to

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[75] Justin Hughes, supra note 28 at 10.

[76] FE Bureau, India Box Office collections: Regional cinema led by Telugu, Tamil movies overtakes Bollywood, Financial Express, July 11, 2020, https://www.financialexpress.com/entertainment/bollywoods-big-but-regional-cinema-is-also-raking-in-the-moolah/2020134/; PTI, Indian film industry's gross box office earnings may reach $3.7 billion by 2020: Report, DNA INDIA, September 26, 2016, https://www.dnaindia.com/entertainment/report-indian-film-industry-s-gross-box-office-earnings-may-reach-37-billion-by-2020-report-2258789/.

[77] Nigel Cory, supra note 36.

[78] Arpan Banerjee, supra note 74 at 609, 672.

[79] See, e.g., Reliance v. Jyoti Cable, (2011) Civil Suit No. 1724 of 2011 (Del. H.C.) (Jul. 20, 2011) (India); Fox v. Macpuler, (2015) Civil Suit No. 2066 of 2011 (Delhi H.C.) (May 14, 2015) (India), Vodafone v. R.K. Productions (2013) 54 P.T.C. (Mad. H.C.) 149, (India), Yash Raj Films v. Bharat Sanchar Nigam, Civil Suit No. 692 of 2016 (Bom. H.C. July 4, 2016); UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018 (Del. H.C.) (Apr. 10, 2019) (India). See Also Javed Anwer, supra note 20; Anupam Saxena, supra note 20.

[80] See e.g UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 21 (concerns around the proportionality of site blocking), 50 (concerns that online infringement should be treated differently than physical infringement), 55 (concerns around maintaining a free and open internet) (Del. H.C.) (Apr. 10, 2019) (India).

[81] Arpan Banerjee, supra note 74 at 609, 669.

[82] Arpan Banerjee, supra note 74 at 609, 666.

[83] Justin Hughes, supra note 28 at 10.

[84] Arpan Banerjee, supra note 74 at 609, 667; See also Kunal Dua, Confusion Reigns as Indian ISPs Block Vimeo, Torrent Websites, NDTV (May 17, 2012), http://gadgets.ndtv.com/internet/news/confusion-reigns-as-indian-isps-block-vimeo-torrent-websites-223340; Nikhil Pawa, Update: Files Sharing Sites Blocked In India Because Reliance BIG Pictures Got A Court Order, MEDIANAMA (July 21, 2011), http://www.medianama.com/2011/07/223-files-sharing-sites-blocked-in-india-because-reliancebig-picturesgot-a-court-order; See also e.g., Reliance v. Jyoti Cable, (2011) Civil Suit No. 1724 of 2011 (Del. H.C.) (Jul. 20, 2011) (India)

[85] Peter Carstairs, supra note 30 at 286.

only the URLs that were specifically hosting infringing content.[86] However, by narrowly tailoring site blocking orders to specific URLs, it became difficult to enforce them when infringers simply changed their URL or domain names.[87] The sometimes overbroad, inadequate, or contradictory site blocking orders, and corollary international developments in site blocking eventually led to the case of UTV Software Communication Ltd. V 1337X.[88]

B. Utv Software Communication Ltd. ... v 1337X: Common Law Site Blocking and Dynamic Injunctions

In the 2019 case of UTV Software Communication Ltd. v. 1337X, companies that were in the business of creating content, producing, and distributing films in India sued a host of defendants, including infringing websites, ISPs, and relevant Indian government agencies.[89]The plaintiffs sought an order directing ISPs to block access to a number of infringing websites like "1337.to" and "yts.am".[90] These websites were eventually found to be "rogue sites" or FIOLs.[91] Addressing the "threat" a site blocking regime poses to internet freedom, Justice Manmohan stated that a site blocking regime was not inconsistent with a free and open internet.[92] He also further iterated the need for the law to address online infringement no differently from offline infringement.[93]

The opinion then proceeded to distinguish between accidental and intentional piracy.[94] Doing so requires effectively defining the scope of what a "rogue website" or "flagrantly infringing online location" (FIOLs) is.[95] This involves considering the proportionality of granting a site blocking order and creating a means of evaluating online

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[86] Vodafone v. R.K. Productions (2013) 54 P.T.C. (Mad. H.C.) 149, ¶ 4 (India) (quoting an earlier order where the court had stated that "the interim injunction is granted only in respect of a particular URL where the infringing movie is kept and not in respect of the entire website.").

[87] Arpan Banerjee, supra note 74 at 609, 668-9; See also Deity v. Star, Review Petition in First Appeal Order No. 57 of 2015, ¶ 14 (Del. H.C. July 29, 2016), available at http://lobis.nic.in/ddir/dhc/PNJ/judgement/29-07-2016/PNJ29072016REVIEWPET1312016.pdf/.

[88] The case cites and points to various international developments in site blocking that it uses to decide the issue. See UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 11, 88-93, 97-98 (Del. H.C.) (Apr. 10, 2019) (India).

[89] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 2-4 (Del. H.C.) (Apr. 10, 2019) (India).

[90] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 2-4 (Del. H.C.) (Apr. 10, 2019) (India).

[91] Nigel Cory, supra note 36.

[92] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 55 (Del. H.C.) (Apr. 10, 2019) (India) ("just as supporting bans on the import of ivory or cross-border human trafficking does not make one a protectionist, supporting website blocking for sites dedicated to piracy does not make one an opponent of a free and open Internet. Consequently, this Court is of the opinion that advocating limits on accessing illegal content online does not violate open Internet principles.").

[93] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 53 (Del. H.C.) (Apr. 10, 2019) (India) ("should an infringer of the copyright on the Internet be treated differently from an infringer in the physical world? If the view of the aforesaid Internet exceptionalists school of thought is accepted, then all infringers would shift to the e-world and claim immunity! A world without law is a lawless world. In fact, this Court is of the view that there is no logical reason why a crime in the physical world is not a crime in the digital world especially when the Copyright Act does not make any such distinction").

[94] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 57 (Del. H.C.) (Apr. 10, 2019) (India).

[95] Peter Carstairs, supra note 30 at 291-93.

behavior.[96] After an exhaustive review of site blocking regimes internationally, including Singapore,[97] the court eventually arrived at a non-exhaustive list of factors to determine if a site is "rogue" or a FIOL.[98] The list of factors are presented below alongside Singapore's aforementioned statutory factors:

UTX v. 1337X Factors[99]	Singapore Statutory Factors[100]
(a) Primary Purpose of the website	1. Primary Purpose of the website is to commit or facilitate copyright infringement
(b) Flagrancy of infringement or facilitation of infringement	
(c) There is no traceable or personal detail of the person who registered the website	
(d) Silence or Inaction by the website after receipt of take down notices for copyright infringement	
(e) The website makes available or contains directories, indexes or categorizes means to infringe or facilitates infringement	2. The website makes available or contains directories, indexes or categorizes means to infringe or facilitates infringement
(f) The owner or operator of the site displays a disregard for copyright generally	3. The owner or operator of the site displays a disregard for copyright generally
(g) Access to the website has been disabled by orders from other jurisdictions for copyright infringement	4. Access to the website has been disabled by orders from other jurisdictions for copyright infringement
(h) The website contains guides or instructions to circumvent measures or	5. The website contains guides or instructions to circumvent measures or

[96] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶¶ 57, 75-82 (Del. H.C.) (Apr. 10, 2019) (India).
[97] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 11 (Del. H.C.) (Apr. 10, 2019) (India). See also Article 193DDA, Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006). See also Parliament of Singapore, Explanatory Statement for the Copyright (Amendment) Bill 2014, supra note 48; Australia, Copyright Amendment (Online Infringement) Act (2018), Section 115A; Justin Hughes, supra note 28 at 9-11.
[98] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 59 (Del. H.C.) (Apr. 10, 2019) (India).
[99] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 59 (Del. H.C.) (Apr. 10, 2019) (India).
[100] Article 193DDA(2), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006).

orders of any court that blocks the site due to copyright infringement	orders of any court that blocks the site due to copyright infringement
(i) Volume of traffic or frequency of access to the website	6. Volume of traffic or frequency of access to the website
(j) Any other relevant matter	

The similarity of these factors reflects a consensus around clear and effective standards which define a "rogue website" or FIOL. Furthermore, the factors have also been regarded in other jurisdictions as a means to ensure that sites largely operated for legitimate purposes are excluded and ensure that a site blocking regime is specifically targeted at sites that "flagrantly" disregard copyright.[101] They reflect a basic understanding that one of the first issues when designing a site blocking regime is to ensure that it only applies to FIOLs or "rogue websites" and to avoid the practice of "over-blocking". One of the best ways to do that is to have a proportionate criterion in making that determination.

Justice Manmohan Singh then also addresses the question of how to make site blocking effective against the practice of "hydra headed rogue websites" resurfacing under mirror websites, changed domain names, or dynamic IP addresses.[102] Explicitly drawing lessons from the Singapore High Court's judgment in Disney Enterprises, Inc v M1 Ltd, the court similarly established a practice of dynamic injunctions to ensure that site blocking orders were effective.[103] Unsurprisingly, the court implemented a similar procedure for the administration of dynamic injunctions allowing for plaintiffs to submit affidavits asserting with evidence that a website is merely a mirror, redirect, or changed IP address of an already blocked site.[104] The reason for dynamic injunctions is a natural extension of the court's qualitative determination of "rogue websites". When considering a blocking order against a site, a court evaluates the site's primary purpose qualitatively to determine if the actions of the site are infringing.[105] This is different from considering it quantitatively, which will limit the court to considering specific URLs or domain names in isolation and blocking orders will lack the breadth necessary to combat the evasive

[101] Peter Carstairs, supra note 30 at 291-92 (stating that the primary purpose language in the Australian statute creates a high threshold inevitably leading to a site blocking regime that is specific and targeted at flagrant infringing sites). See also Article 193DDA(2), Singapore Copyright Act (Chapter 63 of Singapore Laws) (revised 31st January 2006); Parliament of Australia, Explanatory Statement for the Copyright Amendment (Online Infringement) Bill 2018, ¶ 10; Australian Department of Communication and the Arts, Regulation Impact Statement (2018), ¶83. Compare MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005) ("We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties").

[102] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 94-95 (Del. H.C.) (Apr. 10, 2019) (India).

[103] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 100 (Del. H.C.) (Apr. 10, 2019) (India). See also Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 35, 38, 42 (Singapore H.C.) (Singapore)

[104] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 101 (Del. H.C.) (Apr. 10, 2019) (India); See also Disney Enterprise v. Ml Ltd., (2018) SGHC 206 at ¶ 45 (Singapore H.C.) (Singapore)

[105] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 61 (Del. H.C.) (Apr. 10, 2019) (India).

practices of "rogue websites".[106] Indeed, the court also suggests that a site changing URLs and domain names to evade a court order in effect shows that the site is "rogue" because it displays a blatant disregard for copyright and the site blocking order.[107] Therefore, the court in India has found dynamic injunctions as a natural approach towards maintaining the effectiveness of a site blocking regime.

IV. A CIVIL LAW APPROACH: SITE BLOCKING IN FRANCE

It is important to note that unlike Singapore, India, or the United States, Vietnam is a code-based civil law system rather than a common law system. This is largely a feature of Vietnam's colonial history and geography. As a former French colony and communist country, it should not be surprising that Vietnam's legal system is strongly influenced by the historical French code system, Chinese law, and later communist Soviet law.[108] In fact, in its most recent constitutional redrafting, both French and Chinese law were used in various areas as points of reference.[109] In broad strokes, civil or code law jurisdictions regard the legal code as the primary source of law.[110] The cases that arise out of the code are reviewed in isolation on a case-by-case basis without any precedential value.[111] The role of civil code legislation is to be as broad as possible to anticipate the wide variety of potential scenarios.[112] While the differences between Vietnam's code-based system and the common law jurisdictions covered above seem like an obstacle to implementing site blocking in Vietnam, other code-based nations' experiences in site blocking show it is possible.[113] Because of its historical influence on Vietnamese law, it is helpful to also look at how France's code-based civil law system has implemented an effective site blocking regime, based on similar principles of clear legal standards targeting online piracy and responsive enforcement measures.

Within the EU, site blocking begins with the 2001 Information Society Directive. Article 8(3) of the directive provides for the ability for copyright owners to obtain "no fault" injunctions against ISPs to block pirated websites.[114] The French legislature has codified this in the French intellectual property code and its laws for the digital

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[106] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 63 (Del. H.C.) (Apr. 10, 2019) (India).

[107] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 67 (Del. H.C.) (Apr. 10, 2019) (India).

[108] Carol V. Rose, The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study, Law & Society Review, Vol. 32, No. 1. 93, 96-100, (1998).

[109] BUI NGOC SON, Contextualizing the Global Constitution-Making Process: The Case of Vietnam, 64 Am. J. Comp. L. 931, 945-47 (2016).

[110] The World Bank, Key Features of Common Law or Civil Law Systems, https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law

[111] Thomas H. Reynolds (1998). "Introduction to Foreign and Comparative Law". In Rehberg, Jeanne; Popa, Radu D (eds.). Accidental Tourist on the New Frontier: An Introductory Guide to Global Legal Research, 47& 58.

[112] Alain Levasseur, Code Napoleon or Code Portalis?, 43 Tul. L. Rev. 762, 769 (1969) (The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details.)

[113] Most of the EU countries named including France, Germany, and Greece are civil law jurisdictions that have issued site blocking injunctions, see Justin Hughes, supra note 28 at 7.

[114] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 8, 2001 O.J. (L 167); Justin Hughes, supra note 28 at 7.

economy.[115] In applying these laws, French courts have issued site blocking orders not only in cases of copyright infringement[116] but also trademark issues.[117] Furthermore, France has recently been considering administrative measures implementing site blocking like a blacklist of piracy sites.[118] Various European courts have also blocked sites in cases where infringing link without the right holder's permission was hosted[119] and in cases where video sites were found to be "fully dedicated or virtually dedicated" to copyright infringement.[120] The relevant legislation and cases suggest that even in a code-based system, it is possible to have a site blocking regime that is clear and responsive.

French civil courts have also been open to ordering dynamic injunctions against ISPs to address evasive measures taken by some infringing websites.[121] In a case brought by various scientific publishing companies against ISPs seeking dynamic injunctions against infringing sites, the French court applying the aforementioned laws found dynamic injunctions appropriate.[122] This decision was based on similar concerns surrounding the evasive measures taken by some infringing sites in changing domain names and access paths.[123] Similar decisions can be found in many other EU member states with civil law

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[115] Article 6 I 8° of the Law for confidence in the digital economy, ("The judicial authority may prescribe, in summary proceedings or on application, to any person mentioned in 2 (host) or, failing that, to any person mentioned in 1 (ISP), any measures to prevent damage or to put an end to damage caused by the content of a communication service to the public online"); Article L. 336-2 of the French Intellectual Property Code, ("In the event of an infringement of copyright or a related right caused by the content of a communication to the public online service, the president of the judicial court ruling according to the accelerated procedure on the merits may order, at the request of the owner of rights in protected works and objects, their successors in title, collective management bodies governed by Title II of Book III or professional defense bodies referred to in Article L.". 331-1, any measures to prevent or stop such infringement of copyright or a related right, against any person likely to contribute to remedying it. The request may also be made by the Centre national du cinéma et de l'image animée"). See also Alya Bloum, French Supreme Court: Internet intermediaries must pay for blocking measures against illegal streaming websites, August 3, 2017, Hogan Lovells Global Media and Communications Watch, https://www.hlmediacomms.com/2017/08/03/french-supreme-court-internet-intermediaries-must-pay-for-blocking-measures-against-illegal-streaming-websites/.

[116] Clara Hainsdorf & Bertrand Liard, French Courts Ordered to Block and Delist 16 Streaming Websites, JD SUPRA, Jan. 13, 2014, https://www.jdsupra.com/legalnews/french-courts-ordered-to-block-and-delis-08092/.

[117] Anne-Marie Pecoraro, Rodolphe Boissau, Trademark law: counterfeiting. A look back at two trademark court decisions allowing site-blocking of massively infringing sites in France., Dec. 11, 2020, https://www.uggc.com/en/trademark-law-counterfeiting-a-look-back-at-two-trademark-court-decisions-allowing-site-blocking-of-massively-infringing-sites-in-france/.

[118] Nigel Cory, supra note 6; Ernesto Van der Sar, French Minister of Culture Calls For Pirate Streaming Blacklist, April 23, 2018, https://torrentfreak.com/french-minister-of-culture-calls-for-pirate-streaming-blacklist-180423/.

[119] UPC Telekabel Wien v. Constantin Film Verleih, Court of Justice of the European Union, Case C-314/12, ¶ 25, March 27, 2014 ("it must be stated that an act of making protected subject-matter available to the public on a website without the rightholders' consent infringes copyright and related rights"); See also UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 9 (Del. H.C.) (Apr. 10, 2019) (India).

[120] Clara Hainsdorf & Bertrand Liard, supra note 116.

[121] European Union Intellectual Property Office, supra note 26 at 35 ("Dynamic blocking injunctions are available – and have been granted – in most SMS, including Denmark, France, Ireland, Italy, the Netherlands, Spain, Sweden, and the UK"). It could be argued that France imposes a heavier burden on ISPs to police evasive measures undertaken by infringing sites through dynamic injunctions. See Supreme Court of France (Cour De Cassation), 6 July 2017, 16-17.217 (France); Tribunal de grande instance de Paris, 23 May 2019, RG 19/001744 (France).

[122] Tribunal de grande instance de Paris, 7 March 2019, 18/14194 (France). See also, supra note 26 at 77-78.

[123] Id. at 122.

systems.[124] Therefore, when taken together, the French experience and that of many other EU civil law regimes show that a clear and effective site blocking regime is possible in a civil law jurisdiction. Vietnam should be no exception.

V. CLEARING THE FOG: THE NEED FOR EFFECTIVE SITE BLOCKING IN VIETNAM

Vietnam has a rapidly growing online marketplace and a vibrant online infringement culture.[125] Sixty percent of all internet consumers in Vietnam openly admit to streaming on piracy sites.[126] While there are laws that attempt to address the problem of online piracy,[127] the reality is that Vietnam's current framework allows for a fair amount of online piracy.[128] However, it is long overdue for Vietnam to address these issues. [129]With Vietnam's accession to both the CPTPP[130] in 2018 and the WCT at the end of 2021,[131] this has not been more pressing. The previously discussed cases and jurisdictions show that Vietnam has plenty of good examples to follow in establishing an effective site blocking regime with clear legal standards targeting online piracy and responsive enforcement measures to keep up with infringers. They also provide significant guidance on how to consider the potential issues that arise when establishing an effective site blocking regime. However, a lack of clarity and efficacy in Vietnam's intellectual property laws as well as structural issues in Vietnam's economic system pose challenges to the direct application of the previously discussed models.

A. Copyright Protection in Vietnam: A Lack of Clarity and Efficacy

If a clear and responsive site blocking regime is possible, there is a natural question around why Vietnam's current system is inadequate. While the existence of the Vietnamese Law on Intellectual Property and its associated regulations seem to suggest some form of copyright protection that can be used to combat online piracy, Vietnam

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[124] European Union Intellectual Property Office, Study on Dynamic Blocking Injunctions in the European Union, supra note 26 at 110-132; See also e.g. Maritime and Commercial Court (Sø- & Handelsretten), Case Number A-51-17, 21 February 2018, Fritz Hansen A/S and Others (represented by Rettighedsalliancen SMF.) v Telia Danmark A/S and Dominidesign Furniture LTD (Denmark); Sony Music Entertainment (Ireland) & Ors v UPC; Communications Ireland Limited [2016] IECA 231 (Ireland); Amsterdam Court of Appeal, Brein v. Ziggo and XS4ALL, 2 June 2020, ECLI:NL:GHAMS:2020:1421 (Netherlands); Court of Milan, Ordinanza N.42163/2019 R.G. of 5 October 2020, Sky Italia, Lega Serie A V Cloudflare and Others (Italy).

[125] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 108.

[126] New survey shows Vietnam among highest in online piracy in Southeast Asia., supra note 7.

[127] See Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property; Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127.

[128] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 106.

[129] See supra where Vietnam is failing their TRIPS obligations. See also IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 110.

[130] Government of New Zealand, supra note 16.

[131] In short, when Vietnam signed the CPTPP, it took out a reservation on accession to the WCT for three years. This means that Vietnam was allowed to sign the treaty as long as it acceded to the WCT within 3 years. Since the treaty went into effect on December 31, 2018, three years from then is December 31, 2021. See CPTPP, supra note 17 at 18-5, 18-64.

suffers from an absence of law and accountability necessary for its already poor enforcement mechanisms.[132]

1. Vietnam's Law on Intellectual Property

Because Vietnam is a civil code jurisdiction, understanding the copyright protections in Vietnam begins with its intellectual property code.[133] While the law provides for the possibility of administrative sanction and certain remedies for copyright infringement, it does not currently state any form of secondary liability.[134] This is highly problematic when considered in the context of online piracy because most infringers are not ISPs hosting infringing content but are end-users who use an ISP's services to access infringing sites. The lack of secondary liability leaves rights holders with little recourse against online piracy. The problem is further exacerbated when one recalls that secondary liability is largely an operation of common law.[135] Without statutes like the aforementioned French provisions which allow courts to hold third-parties accountable,[136] it is unclear how much authority Vietnamese courts have over ISPs. With such a lack of clarity over the law, it would be difficult to hold ISPs accountable much less ask them to block sites. Thus, the lack of ISP accountability has allowed for purveyors of online piracy and their end-users to effectively escape any form of consequences.

2. Circular 07

Interestingly, in 2012, the Ministry of Information and Communications in Vietnam released Joint Circular 07/2012/TTLT- BTTTT – BVHTTDL, stipulating the duties of enterprises providing intermediary service, like ISPs, in the protection of copyright and related rights on the Internet and in the telecommunication networks environment.[137] It imposed a duty on ISPs and intermediaries to take down infringing content and terminate services under certain circumstances,[138] and only under state direction.[139] Article 5 of Circular 07 does this by stipulating that ISPs have a duty to remove and delete "content of digital information which violates copyright and related rights, cutting, stopping and suspension of the Internet line, telecommunication line as receiving request in written of the inspector of the Ministry of Information and Communications or inspector of the Ministry of Culture, Sports and Tourism or other competent State agencies as prescribed

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[132] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 106-7.

[133] Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property, supra note 127.

[134] I cannot prove a negative but the law will be cited so people can see for themselves. Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property, supra note 127; See also IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

[135] 3 Nimmer on Copyright § 12.04 (2021).

[136] Notice these statutes both allow for the holding of third parties to the infringement accountable, Article 6 I 8° of the Law for confidence in the digital economy, see supra note 115; Article L. 336-2 of the French Intellectual Property Code, supra note 115.

[137] Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127 at Article 5.

[138] Id. at 137.

[139] Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127 at Article 5; IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

by law".[140] Despite the existence of such regulation, this authority has been used in practice only in very narrow circumstances where online services and websites are directly infringing.[141] This is likely because Circular 07 does not spell out clear penalties against ISPs for violating such a duty and a general lack of enforcement by the Vietnamese government.[142]

Further, the type of blocking provided in Circular 07 may only apply to websites that use the "internet services of a Vietnam company," i.e., if an infringing website uses a host that is provided by a Vietnamese company, registered a domain name with a Vietnamese Company (Vietnamese registrar), or uses an IP address that is managed by a Vietnamese company.[143] If this is correct, the effectiveness of the website blocking provision will be greatly different and even reduced[144], as it does not account for the borderless nature of online piracy. Moreover, it does not seem like Circular 07 allows for dynamic injunctions or blocking against ISPs. When placed together with Vietnam's Law on Intellectual Property, it is hard to see any concrete avenues for rights holders to hold ISPs accountable for the rampant online piracy that is occurring in Vietnam. The main issue with Circular 07 is not that it does not create some form of site blocking in Vietnam, but rather it creates a form of site blocking so toothless that it is ineffective.

3. Structural Problems

Moreover, there are issues with Vietnam's legal and market system which contribute to a culture of online piracy. Vietnam has and continues to have restrictions preventing foreign companies from setting up subsidiaries to distribute "cultural products" and has entry barriers around the importation and distribution of copyrighted works.[145] These restrictions on market access fosters a demand for pirated content, which inevitably pushes Vietnamese consumers towards their illegal alternatives.[146]

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[140] Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127 at Article 5.

[141] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

[142] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 107; See also Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127.

[143] Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127 at Article 1; IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

[144] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

[145] Nguyen Huy Hoang, Ho Thi Le Tra, Market access conditions applied to foreign investors under Decree No. 31/2021/nd-cp, Lexology, 20 September 2021, https://www.lexology.com/library/detail.aspx?g=35eb4d79-ad70-4865-8fc6-6a03760f6a6e/; See also IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

[146] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 112.

Another issue is that no John Doe suits are allowed for the enforcement of copyright.[147] This means that, unlike in India, in order to sue for infringement rights holders are required to acquire evidence of each infringer. The lack of John Doe suits and the impossibility of investigation, when placed together with the fact that the Vietnamese have been known to impose onerous and detailed requirements around the identification of infringers[148] are all indicative of an enforcement system that is not necessarily functioning. It should come as no surprise that to date there has never been any criminal proceeding brought for online infringement.[149] More significantly, they pose problems for rights holders who may eventually wish to seek redress via a site blocking order but cannot because they lack the ability to ascertain if there is infringement or who is infringing.

Further, Vietnam has laws around foreigners conducting investigations which prevents rights holders from effectively discerning if their works are being infringed or gathering evidence to meet Vietnam's already amorphous yet onerous standards around online piracy and copyright enforcement.[150]

B. Site Blocking in Vietnam: Possible Approaches

While a complex array of overlapping factors seems to be the reason behind Vietnam's currently lackluster copyright regime, the main obstacle seems is a lack of effective ISP regulation. When ISPs are not compelled to move against infringement it creates an environment where the online world is insulated from laws. This creates a flight of infringers online to escape the reach of the law.[151] This is happening online in Vietnam.[152] Thus, any solution to online piracy in Vietnam must be able to bring the law into the online world. Effective site blocking arises as a means for bringing physical legal consequences into the online sphere. By enacting a clear, and responsive site blocking regime, Vietnam can begin to hold ISPs accountable for the infringing activity that they facilitate and prevent infringers from accessing those sites. However, if there are any lessons to be learned from Vietnam's experience with Circular 07 and other countries' experiences, site blocking regimes cannot be limited by the geographic location or domain names. They must be allowed to act on any site based on the qualitative nature of the site towards copyright infringement. The enactment of such a regime can happen in Vietnam in many ways, this note looks proposes two possible approaches that are feasible and considers their effect on online piracy in Vietnam.

1. A Statutory Approach

One approach Vietnam could take to institute a site blocking regime would be to draw from the Singaporean or French experiences and introduce statutory measures which

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[147] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 106.
[148] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 108-9.
[149] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 109.
[150] Id. at 148.
[151] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 53 (Del. H.C.) (Apr. 10, 2019) (India).
[152] IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 108.

directly enact a Vietnamese site blocking regime that reflects current international norms. This could happen in two ways. Vietnam could, drawing from their French tradition, embrace the broad approach that is traditional to civil law jurisdictions[153] and enact a broad statute allowing for rights holders to apply for injunctions when ISP services are being used to infringe copyright. A broad statute establishing such a site blocking regime is likely to look like Article 8(3) of the EU, 2001 Information Society Directive or the other French statutes mentioned above[154]. This would largely leave effective enforcement to Vietnam's courts. Alternatively, Vietnam could look to its neighbor Singapore and enact a rather tailored statute, which clearly identifies the scope of the site blocking regime. Such a statute would not look very different from those in Australia.[155]

In light of Vietnam's existing judicial and statutory system, this approach does not seem wise. Given the onerous evidentiary requirements and inability of foreign rights holders to investigate any infringement[156], it is unlikely that such an approach would be able to successfully change the status quo. In fact, this becomes all the more obvious when there has been a conversation around court reform in Vietnam, particularly in the intellectual property space.[157]

Furthermore, while a tailored statutory framework may provide more guidance to Vietnam's courts in their implementation of a site blocking regime, it still does not solve the fact that cases will have to be brought within Vietnam's onerous evidentiary and investigatory laws.[158] The above analysis shows that any statutory approach altering Vietnam's legal code towards establishing a site blocking regime would likely require secondary legal reforms to even remotely be able to operate. This makes it unlikely that such an approach will have much success in helping Vietnam achieve a more robust copyright regime.

2. Administrative Approach

A more promising approach towards introducing an effective site blocking regime in Vietnam is via administrative law. This approach largely relies on the fact that Circular 07 has already given Vietnamese inspectors at the Ministry of Information and Communications or the Ministry of Culture, Sports, and Tourism the authority to impose a duty on ISPs to takedown infringing content and stop access.[159] Given that those ministries already have the power to impose site blocking orders on ISPs, one possibility would be the creation of more regulations outlining how rights holders can petition the

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153 Id, at 112.

154 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 8, 2001 O.J. (L 167)

155 Peter Carstairs, supra note 30 at 284-85. See also Australia, Copyright Amendment (Online Infringement) Act (2018), Section 115A; Professor Justin Hughes, response to questions from Senators Tillis, Coons, and Blumenthal, Senate Judiciary Committee / Intellectual Property Subcommittee, 11 & 42, 14 April 2020 (noting the similarities in the Australian and Singaporean site blocking statutes).

156 Id. at 148.

157 IIPA 2021 Special 301 Report on Copyright Protection and Enforcement submitted to the USTR, supra note 9 at 113.

158 Id, at 148.

159 Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL of June 19, 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism Stipulating Duty of Enterprises Providing Intermediary Service in Protection of Copyright and Related Rights in the Internet and Telecommunication Networks Environment, supra note 127 at Article 5(3).

various ministries for relief. This approach has the benefit of allowing the Vietnamese government the flexibility to leave most of their current legal framework entirely intact and simply shift its approach to online piracy within its governmental bureaucracy. This is because a regulatory approach via administrative law allows the Vietnamese ministries to simply stipulate whatever it wishes to consider when asking an ISP to block a site. This would bypass any conflicts with existing issues concerning onerous evidentiary requirements and help lessen the effect of restrictive foreign investigation restrictions.

However, as we have observed from the international experience with site blocking, effective site blocking regimes operate best when there are clear standards are establishing FIOLs followed by flexible and responsive enforcement. This responsive enforcement is usually categorized by allowing for the subsequent blocking of the same sites under changed domain names, URLs, IP addresses, and more. As such this administrative approach is likely to look like the blacklist of illicit sites that the French were considering,[160] with the procedure for filings mirroring satisfaction of the factors articulated in the Indian and Singaporean experiences in defining FIOLs. It should also allow for blocking orders from the ministries to function like dynamic injunctions by allowing subsequent affidavits to be submitted to allow changes in domain names, URLs, and IP address, to be added to the blacklist.

While seemingly effortless, the establishment of a site blocking regime via the ministries may require the ministries to amend Circular 07 to address what happens in the event ISPs do not comply with an administrative order. This is so site blocking orders from the ministry are obeyed and have teeth. Furthermore, an administrative driven approach to site blocking would not be difficult for the Vietnamese government to implement but may require an increase in the number and effectiveness of its administrative personnel to adequately address the various petitions that will inevitably be filed. It should also be noted that such an approach does place a disproportionate amount of power to censor the internet in the hands of the Vietnamese government.[161] Despite this, an administrative approach to site blocking in Vietnam seems like the most efficient and painless approach possible.

CONCLUSION

The growth and expansion of Vietnam's online marketplace poses serious challenges to effective copyright enforcement, especially in light of its intellectual property laws. Vietnam's increasing economic development and accession to various economic treaties makes it an increasingly attractive location for investment in the global economy. This includes many domestic and foreign authors and copyright holders who may want to sell and distribute their works to a captive audience. However, the prevalence of online piracy in Vietnam poses a major obstacle to the development of Vietnam's creative economy. Vietnam's recent ratification of the CPTPP and accession to the WCT late last year, make how Vietnam eventually addresses online piracy all the more pertinent. At first glance, Vietnam's online piracy appears to be a challenging problem. Fortunately, many nations have effectively dealt with the threat of online piracy to

[160] Nigel Cory, supra note 6; Ernesto Van der Sar, supra note 118.

[161] There has been some commentary that such unilateral power over copyright law can have effects on the nature of free speech, particularly in countries with more communistic style governments, See Stephen McIntyre, The Yang Obeys, but the Yin Ignores: Copyright Law and Speech Suppression in the People's Republic of China., 29 UCLA PAC. BASIN L.J. 75, 77-81(2011).

copyright through the implementation of site blocking. Vietnam's Asian neighbors are no strangers to site blocking and can serve as guides for what might be possible in Vietnam. Ideally, good site blocking regimes possess clear rules which allow for the identification of FIOLs and responsive enforcement mechanisms to address guileful bad actors. In common law jurisdictions, like India[162] and Singapore[163], this has resulted in clear factor tests followed by dynamic injunctions. In contrast, civil law jurisdictions have also found success in well-constructed broad statutes that allow their courts to effectively address the idiosyncrasies of the case in front of them. The bitter pill is that Vietnam has a myriad of options and jurisdictions from which it can take lessons to implement an efficient copyright enforcement regime that includes site blocking as one of its tools. However, none of those options that currently exist can be implemented without some changes to Vietnam's existing framework. This is further exacerbated by the reality that Vietnam's obligations to the CPTPP and the WCT have come due which requires Vietnam to act now.

[162] UTV Software Communication Ltd. V 1337X, (2019) Civil Suit No. 768 of 2018, ¶ 59 (Del. H.C.) (Apr. 10, 2019) (India).
[163] Singapore, Copyright Act (Chapter 63 of Singapore Laws), Article 193DDA (revised 31st January 2006).

OF DOG FOOD AND JUDICIAL ETHICS:

CLARENCE THOMAS' FIRST FAILURE TO RECUSE HIMSELF

Keith M. Stolte*

Abstract: In March 2022, the public was stunned to learn that Virginia Thomas, wife of Justice Clarence Thomas, was in steady communication with Mark Meadows, Donald Trump's Chief of Staff, supporting Trump's efforts to overturn the presidential election results of the 2020 election. Moreover, political leaders and legal practitioners were troubled that Clarence Thomas had not recused himself in *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022), a case involving Trump's application for an injunction against the National Archives turning over thousands of presidential documents to the House Select Committee, which was investigating the January 6, 2021 insurrection at the U.S. Capitol. This severe ethical lapse by Thomas is the latest in a series of ethical improprieties going back 30 years. The first in the catalogue of Thomas' ethical violations was his decision in *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), which materially changed the law of Lanham Act remedies in the D.C. Circuit. The article delves into Thomas' bizarre and erroneous legal analysis that resulted in overturning a multimillion-dollar false advertising damage award against pet food manufacturer Ralston-Purina. It will also discuss the unusually close mentor-mentee relationship between Thomas and Senator John Danforth of Missouri, grandson of the founder of Ralston-Purina and whose family owned a large holding of stock in the company. Danforth was instrumental in guiding Thomas' entire career and had a hand in obtaining every job in Thomas' post-law school life, including his present one. This extraordinarily close relationship created a conflict of interest that should have led Thomas to recuse himself from considering the *Alpo* case.

Keywords: Ethics; Recusal; Virginia Thomas; John Danforth; Clarence Thomas

* Private Practice

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INTRODUCTION

On January 19, 2022, the United States Supreme Court issued its decision in *Trump v. Thompson, 142 S. Ct. 680, 680 (2022)* denying former President Donald Trump's application for a stay of mandate and injunction, thereby permitting the National Archives to turn over four tranches of Trump presidential records to the January 6 Select Committee of the U.S. House of Representatives. Several journalists and members of the Bar took notice at the time that Associate Justice Clarence Thomas was the sole dissent without a written justification. Many criticized Thomas for voting to permit Trump to exert executive privilege, contrary to the waiver of privilege by the sitting President, and shield the documents from scrutiny by the January 6 Committee investigating the aborted insurrection at the United States Capitol on January 6, 2021.

Norm Ornstein, a contributing editor for The Atlantic, argued that Justice Thomas should have recused himself, citing his wife, Virginia "Ginni" Thomas, who had signed an open letter critical of Liz Cheney and Adam Kinzinger, the two Republican members of the House Select Committee. Ornstein had tweeted, "The fact that Clarence Thomas continues to fail to recuse himself, given the activities of his wife that are directly related to the insurrection, is mind-boggling." Little more was made of Thomas' decision not to recuse himself in *Trump v. Thompson* – until, that is, the news broke two months later that Ginni Thomas had exchanged at least 29 text messages with then-White House chief of staff Mark Meadows, as both of them strategized about overturning the 2020 election result.[1] Following this disclosure, an avalanche of criticism erupted from journalists, elected officials, public figures and members of the Bar, most emphasizing the glaring conflict of interest Justice Thomas casually ignored when taking part in the *Thompson* decision. Suddenly, the press and Capitol Hill were briming with calls for Thomas' immediate resignation or impeachment over his failure to recuse himself and, some argued, his corrupt effort to shield from public view his wife's use of her access to Trump's inner circle to promote and seek to guide the president's strategy to overturn the election results.

Thomas's failure to recuse himself in *Trump v. Thompson* is the most recent (and most damning) in a long history of judicial ethics violations reaching back more than 30 years to Thomas' tenure on the U.S. Court of Appeals for the District of Columbia. This article reveals Clarence Thomas' first ethical lapse as a judge for failing to recuse himself in the face of a conflict of interest based on his relationship to someone nearly as close to him as Ginni Thomas.

On May 5, 2017, dozens of newspapers throughout the United States ran a short article by the Associated Press reporting on a speech that Clarence Thomas gave at a Law Day event sponsored by the Bar Association of Metropolitan St. Louis. Thomas did not say much beyond his usual stump speech heralding the concept of limited government. But the AP headline parroting Thomas's comments to former Missouri Senator John C. Danforth spoke volumes. During the speech Thomas turned to Danforth, then 80, and told him, "You are the reason why I'm here." Thomas further made the exuberant declaration that he owed his career to the former Senator.

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[1] B. Woodard & R. Costa, *Virginia Thomas Urged White House Chief to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, Washington Post (March 24, 2022). https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/.

The Justice was not exaggerating - John Danforth was instrumental in guiding Thomas' entire career and had a hand in obtaining every single job in Thomas's post-law school life, including his present one. Thomas' heart-felt exclamations of gratitude to his mentor and political patron points a spotlight on a particular instance of what the author perceives to have been Thomas' first failure in judicial ethics - there have been several.[2]

Without a doubt, former President George H.W. Bush's nomination of Thomas to the court in 1991 was one of the most controversial Supreme Court appointments of the twentieth century. During the confirmation process, provocatively referred to by Thomas as a "high-tech lynching," Thomas was forced to answer to charges running the gamut from his purported disavowal of federal affirmative action policies, his supposed affinity to natural law concepts, to the more explosive issue of his more prurient tastes, shall we say, and alleged sexual harassment of female colleagues. Less of an issue at the time was the concern of many that Thomas did not meet the minimum threshold of judicial experience and legal scholarship that citizens should expect from a nominee to the nation's highest judicial body.[3]

Despite all of the scrutiny, one issue that Justice Thomas never had to publicly address during the confirmation process was his involvement, at the very outset of his

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[2] Other instances of potential unethical conduct include, for example, Thomas's failure to recuse himself in *Bush v. Gore*, 531 U.S. 98 (2000), which effectively terminated Al Gore's claim on the presidency. Virginia Thomas' was, at the time, employed by the Heritage Foundation and solicited resumes on behalf of the Bush campaign for candidates interested in positions in the prospective Bush administration. Christopher Marquis, *Job of Clarence Thomas' Wife Raises Conflict of Interest Questions*, New York Times (Dec. 12, 2000), https://www.nytimes.com/2000/12/12/us/contesting-vote-challenging-justice-job-thomas-s-wife-raises-conflict-interest.html?ref=virginia_lamp_thomas. Subsequently, Mrs. Thomas herself landed a job in the Bush administration. Another example is Thomas' filing over several years of annual financial statements stating (under oath) that his wife made no income when she had, in fact, earned roughly $700,000 in income during the period. Kim Geiger, *Clarence Thomas Failed to Report Wife's Income, Watchdog Says*, Los Angeles Times (Jan. 22, 2011)), https://www.latimes.com/politics/la-xpm-2011-jan-22-la-na-thomas-disclosure-20110122-story.html. website. Stephen Gillers, a professor at NYU School of Law, stated that Thomas' omission could be interpreted as a violation of law and could lead to some form of penalty. *Id*. "It wasn't a miscalculation; he simply omitted his wife's source of income for six years, which is a rather dramatic omission," Gillers said. "It could not have been an oversight." *Id*. The many ethics charges against Thomas over the years exceed the level of such charges against his brethren on the High Court (and probably other judges at the appellate level).

[3] SENATE RECORD VOTE ANALYSIS, 102d Cong., 1st Sess., S-14704 Temp. Cong. Rec. (Oct. 15, 1991). In this brief synopsis of the positions taken by Senators in favor of and in opposition to Clarence Thomas' nomination to the Supreme Court, one point expressed by the opposition is as follows:

> On the issue of competence, we were distressed by his weak legal credentials. He practiced law for only five years, until age 31. He does not have an extensive record of scholarship or expertise in any area of law, and he served as a judge for a mere 17 months. An analysis done by the National Association for the Advancement of Colored People found him to be less qualified than the last 48 Judges who were appointed to the bench. We are told by Clarence Thomas' supporters that he has tremendous capacity for growth, but we believe that it would be a mistake to confirm a nominee whose most impressive legal credential is his capacity for growth.

This rather apt characterization of Mr. Thomas's level of legal experience and lack of scholarship calls into question former President George H.W. Bush's overstatement, told with no apparent sense of irony, that Clarence Thomas was "the most qualified person in the country for the position."

short stint as an appellate judge on the Court of Appeals for the D.C. Circuit, in a false advertisement lawsuit that posed significant ethical implications and called into question his judicial impartiality, and thus his suitability to sit on the highest court. While the issue was briefly, but forcefully, touched upon by a witness during the Senate confirmation hearings, the Senate Judiciary Committee quietly swept it under the carpet, probably because the lawsuit in question also involved the financial and family interests of Senator John Danforth, one of the most respected, even revered, members of that august body. With a few exceptions, the press and legal community unaccountably failed to seriously treat the matter, opting instead to focus almost complete attention on the salacious Anita Hill story.

Thomas' decision in *Alpo Petfoods, Inc. v. Ralston-Purina Co*., 913 F.2d 958 (D.C. Cir. 1990), has become a much-cited authority with respect to certain trademark and false advertising issues. That case announced significant changes in the law of trademark remedies in the D.C. Circuit: (i) the novel (and legally erroneous) concept that corrective advertising damages are actually an equitable award of profits, thus requiring a showing of bad faith; and (ii) a new rule that deterrence alone is not a basis for an award of a Lanham Act defendant's profits. Thomas' opinion in the case also seriously misread or ignored the factual findings of the trial court, contrary to applicable standards if review. This article will first analyze Justice Thomas' quirky and legally questionable analysis in the *Alpo* case and then discuss Thomas' violation of judicial ethical standards by his failure to recuse himself from considering the case – a harbinger of things to come.

I. THOMAS' *ALPO* DECISION RAN AFOUL OF SEVERAL LANHAM ACT EVIDENTIARY RULES AND IMPROPERLY ENGAGED IN A DE NOVO REVIEW OF THE FACTS

Alpo Petfoods, Inc. v. Ralston Purina Company has become one of the leading cases on the scope and evidentiary thresholds for monetary relief in trademark and false advertising cases. In *Alpo*, Ralston-Purina advertised that its Puppy Chow dog food would lessen the severity of canine hip dysplasia. Ralston-Purina ran nationally televised advertisements that stated the improved dog food "helps critical bone development." At the same time, Ralston-Purina's competitor, Alpo, was advertising that leading veterinarians preferred its product 2-1 over the "leading puppy food," impliedly referring to Puppy Chow. Both companies sued each other under Lanham Act, § 43(a), 15 U.S.C. § 1025(a) for the advertisements, claiming they were false and misleading.

After a two-month trial, U.S. District Judge Stanley Sporkin, mainly weighing expert testimony, first held there was no statistically significant empirical evidence to support the claims of Ralston-Purina that its puppy food would lessen the severity of canine hip dysplasia.[4] The court also concluded that Alpo's claims that veterinarians preferred its product were false.[5] The court entered injunctions against both Ralston-Purina and Alpo. However, because the court found only Ralston-Purina's conduct was willful and in bad faith, stressing that the company "perpetrated a cruel hoax" on dog owners, the court only awarded damages against Ralston-Purina.

Judge Sporkin awarded Alpo $10.4 million in corrective advertising damages. Applying the rationale in *U-Haul Int'l, Inc. v. Jartran, Inc*., 793 F.2d 1034, 1042 (9th Cir.

[4] *Alpo*, 913 F.2d at 962.
[5] *Id.*

1986), Judge Sporkin calculated the corrective advertisement damages by determining Ralston-Purina's expenditures in its advertisement campaign and then quartering it. The court also allowed each party an award of attorneys' fees. Ralston-Purina appealed to the Circuit Court of Appeals for the District of Columbia. Alpo did not appeal the judgment against it.

On appeal, Thomas, writing for the three-member panel that also included circuit judges Edwards and Sentelle, provided the proper framework for a false advertisement case - "to prevail in a false advertising suit under section 43(a), a plaintiff must prove that the defendant's ads were false or misleading, actually or likely deceptive, material in their effects on buying decisions, connected with interstate commerce, and actually or likely injurious to the plaintiff. "[6] The court affirmed the lower court's finding of liability against both Ralston-Purina and Alpo on each element. However, Thomas's decision set aside the corrective advertising damages awarded to Alpo as clearly erroneous.

In reversing the $10.4 million damages award, Clarence Thomas crafted an entirely new evidentiary threshold for awarding corrective advertising damages in false advertising cases. Generally, in Lanham Act cases, there is never a need to demonstrate bad faith or willfulness to obtain an award of reasonable corrective advertising damages or other legal damages.[7] Such legal damages were traditionally available to make the plaintiff whole, and did not typically turn on a defendant's scienter.[8] By 1990, however, a number of circuit courts had established that a finding of willfulness or bad faith is a requirement to recover the equitable remedy of profits in trademark, unfair competition and false advertising cases.[9] The Act itself dictates that an award of attorneys' fees requires "exceptional circumstances" which is generally understood to mean willfulness or bad faith. 15 U.S.C. § 1117.

Based on some unusually tortured reasoning, Judge Thomas construed the corrective advertising damages awarded by the lower court as an award of Ralston Purina's profits, thus invoking the bad faith evidentiary requirement some courts had adopted. But the district court made it quite explicit that it was awarding corrective advertising damages, not profits. For example, the lower court stated, "[a]fter considering the various measures of damages, the court finds the most appropriate measure would be one that is based on Ralston's advertising expenditures as they pertain to the dissemination of its deceptive message."[10]

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[6] *Alpo*, 913 F.2d at 964.

[7] *See* James M. Koelemay, *A Practical Guide to Monetary Relief in Trademark Cases*, 85 Trademark Rep. 263 (1995) (correctly characterizing corrective advertising monetary relief as a form of legal damages and stating that bad faith is not necessary for an award of damages, although the trend is to require a finding of bad faith for profits); Restatement (Third) of Unfair Competition, 36, Cmts. g, j & 37 (American Law Institute 1995) (wrongful intent is not required for damages, but is for an award of profits).

[8] *Id.*

[9] *See generally* Keith M. Stolte, *Remedying Judicial Limitations on Trademark Remedies: An Accounting of Profits Should Not Require a Finding of Bad Faith*, 87 Trademark Rep. 271 (1997). Other circuit courts rejected the bad faith requirement for an award of profits under the Lanham Act. In 2020, the Supreme Court unanimously resolved the circuit split, concluding that willful infringement is not a prerequisite to an award of profits under 15 U.S.C. § 1117(a). *Romag Fasteners, Inc. v. Fossil, Inc*., 140 S.Ct. 1492 (2020).

[10] *Alpo*, 720 F. Supp. at 215 (citing *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1042 (9th Cir. 1986)).

Judge Sporkin found Ralston-Purina had expended $5.2 million in its offensive advertisement program, but also found that an award of this amount was not enough for Alpo to correct the widespread deception caused by Ralston's ads.[11] Based on the Lanham Act's explicit provision for a court to increase damages by as much as three times,[12] Judge Sporkin doubled Ralston's $5.2 advertising expenditures and awarded Alpo $10.4 million in corrective advertising damages.[13]

In a strange attempt to fit a square legal peg into a round equitable hole, Thomas claimed that, while the trial court expressly stated that it was awarding damages, the court actually awarded profits.[14] This dubious assessment was based, in large part, on Judge Sporkin's gratuitous comparison of the comparative advertisement damages calculation to Ralston's adjusted profits arising from its sales of Puppy Chow: "This amount [$ 10.4 million] is close to the $11 million dollar adjusted net profits Ralston earned from the sales of its Puppy Chow products during the period of its CHD advertising program."[15] Had Judge Sporkin granted Alpo Ralston-Purina's profits, the monetary award would have been $600,000 (or 5.7 percent) greater. Sporkin's decision, on its face, demonstrates he did not award Ralston's profits. Thomas further based his assertion that the monetary relief granted to Alpo constituted profits on his mischaracterization that the Ninth Circuit in *U-Haul* construed corrective advertising awards as profits.[16] Only a convoluted reading of that case could result in such a construction.

In *U-Haul Intl, Inc. v. Jartran, Inc*., 601 F. Supp. 1140 (D. Ariz. 1984), the trial court granted the plaintiff $40 million in a false advertising case, one of the most substantial Lanham Act damages awards in history. The court calculated the base award of $20 million dollars on the grounds that the evidence established the plaintiff suffered lost revenues of approximately $22,500,000.[17] The court also stated, "I would arrive at the same damage award by allowing U-Haul its [corrective] advertising costs of $13,600,000 and awarding it the $6,000,000 expended by Jartran to carry out the offending ad campaign."[18] The court then doubled the base award to $40 million under the court's discretionary powers to increase damages in accordance with Lanham Act Section 35, 15 U.S.C. § 1117 or, alternatively, as punitive damages under the common law claims.[19].

Nowhere in the lower court's decision in *U-Haul* did the court ever mention or even hint at any intention to award the defendant's profits or to construe the lost revenue or corrective advertising damage calculations as an award of profits. On appeal, the Ninth Circuit acknowledged and affirmed the district court's award of "actual damages" of $20 million, and the alternative calculation of the defendant's actual advertising expenditures ($6 million) coupled with the plaintiff's expenditures of corrective advertising ($13.6 million).[20] Tangentially, the appellate court addressed the defendant's argument that the lower court erred in awarding the $6 million dollars it had spent in its false advertising

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[11] *Id.*
[12] 15 U.S.C. § 1117.
[13] *Alpo*, 720 F. Supp. at 215.
[14] *Alpo*, 913 F.2d at 967.
[15] *Alpo*, 720 F. Supp. at 215.
[16] *Alpo*, 913 F.2d at 967.
[17] *U-Haul*, 601 F. Supp. at 1146.
[18] *Id.*
[19] *Id.* at 1150.
[20] *U-Haul*, 793 F.2d at 1037, 1041-42.

program as "profits."[21]. The lower court, however, made no mention of an award of profits and did not equate that portion of the corrective advertising damages as profits. Despite this, the Ninth Circuit opined, in dicta, that the defendant's advertising expenditures reflected, in part, "the financial benefit [the defendant] received because of the advertising."[22] Ignoring entirely the lower court's published decision, Judge Thomas seized on this phrase by the Ninth Circuit and then mischaracterized the corrective advertising damages award in *U-Haul* as an award of the defendant's profits, not legal damages.[23]

Having now improperly invoked a bad faith requirement for the monetary relief granted by the lower court in *Alpo*, Thomas then took pains to hold that Judge Sporkin's willfulness findings were clearly erroneous. Even though Judge Sporkin found that there was evidence demonstrating Ralston-Purina (i) had intentionally "withheld vital information from the public, from the government and from [the] court,"[24] (ii) had allegedly destroyed certain adverse documents,[25] (iii) had used its offensive advertising claims to target and injure competitors, particularly Alpo,[26] and (iv) had "perpetrated a cruel hoax" on dog owners,[27] Judge Thomas nevertheless determined that this was not enough to prove bad faith, bad intent, or willfulness.[28] As one commentator sardonically declared, "[i]n sum and substance, the Thomas opinion considered all of Ralston's actions to be normal business practices that did not imply bad faith or willfulness."[29] In sum and substance, Judge Sporken's opinion did not.

Without the benefit of all the detailed evidence that Judge Sporkin heard over a two-month trial and the attendant ability to make witness credibility determinations, Thomas summarily declared that Ralston's ads were based on "honest differences of scientific opinion," and that there was no "connection between [the] defendant's awareness of its competitors and its actions at those competitor's expense."[30] Thomas did note that comparative false advertising claims have been equated to passing off of a trademark, but nevertheless found lacking evidence that the advertisement in Alpo was directed specifically at a competitor.[31] Thomas simply ignored Judge Sporkin's factual findings that Ralston intentionally deceived and mislead the public for the specific purpose of injuring Alpo's launch of a competitive product.[32] A fair and objective review of both the district court's and appellate court's decisions in *Alpo*, compels the conclusion that Thomas

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[21] *Id.* at 1043.
[22] *Id*.
[23] *Alpo*, 913 F.2d at 967.
[24] *Alpo*, 720 F. Supp at 216.
[25] *Id.*
[26] *Id*. at 201.
[27] *Id*. at 213.
[28] *Alpo*, 913 F.2d at 966.
[29] Felix H. Kent, *The Damage Issue in Section 43(a) Actions*, N.Y. L. J., vol. 206, no. 120, p. 3 (1991).
[30] *Alpo*, 913 F.2d at 966.
[31] *Id*. (citing *General Mills, Inc. v. Kellogg Co*., 824 F.2d 622, 627 (8th Cir. 1987)).
[32] *Alpo*, 720 F. Supp. at 201.

and his colleagues overreached their authority in holding Judge Sporkin's factual findings of bad faith and willfulness clearly erroneous.[33]

The court remanded the case for computation of actual damages suffered by Alpo, which the court instructed "must have support in the record." These damages, Thomas wrote, can include the profits lost by the plaintiff for sales actually diverted to the defendant; profits lost as a result of the plaintiff's need to lower prices to compete, costs of completed advertising to respond to the false advertising, and quantifiable harm to the "goodwill" of the plaintiff (but only to the extent that corrective advertising has not, and cannot, repair the harm).[34] The district court was further instructed to consider the difficulty of proof of such damages.[35] The court also reversed the award of attorneys' fees because the lower court did not make a finding of bad faith. [36]

The D.C. Circuit's decision in *Alpo* raises a number of questions that have been ignored by other courts and commentators. For example, why did the court deviate from established law to require bad faith or willfulness in order to obtain an award of corrective advertising damages, which is a legal not equitable form of relief? Why did the court improperly equate corrective advertising damages to a defendant's profits? Why did the court ignore the trial court's specific factual findings of Ralston-Purina's bad faith and substitute its own business moral paradigm instead?

One could conclude that Thomas' very limited experience on the bench (*i.e.*, weeks) at the time and his lack of familiarity with evidentiary rules applicable to Lanham Act cases might explain these anomalies. Or there may be another, more insidious basis for the legal flaws and factual overreaches in Thomas's *Alpo* decision; one that takes into account that Thomas's greatest professional mentor, patron and close friend of more than 16 years owned a significant amount of Ralston-Purina's stock and whose family founded the company and exercised corporate control of the company for nearly a century. The next section explores the exceedingly close professional and social relationship between Thomas and former Senator John C. Danforth of Missouri, and suggests that Thomas violated established rules of judicial conduct by failing to recuse himself as a member of the *Alpo* appellate panel because of this close relationship and the questions of impropriety that reasonably arose under the circumstances.

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[33] *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently"). Rule 52(a) mandates clearly erroneous review of all district court fact findings: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). The rule "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *see also Inwood Labs., Inc. v. Ives Labs., Inc*., 456 U.S. 844, 855-58 (1982). The Supreme Court has emphasized on multiple occasions that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 123 (1969). A fair reading of the appellate court's decision in Alpo suggests that the court's factual assessment of Ralston's intent (an issue typically tied to the credibility of witnesses) was based on a *de novo* review.

[34] *Alpo*, 913 F.2d at 969.

[35] *Id*.

[36] *Id*. at 971. Thomas left undisturbed the lower court's award of attorney's fees to Ralston-Purina on the basis that Alpo did not appeal this issue.

II. THOMAS' CLOSE RELATIONSHIP WITH SENATOR DANFORTH MANDATED HIS RECUSAL FROM THE ALPO APPELLATE PANEL

A. Clarence Thomas was an Intimate Friend and Protégé of Senator Danforth for Most of his Adult Life

No one can reasonably question the crucial assistance and contributions former Senator John Danforth[37] provided in every aspect of Clarence Thomas' career.[38] In fact, Thomas' close association with Senator Danforth would "prove to be the most important in his professional life[39] as Thomas himself conceded in his May 5, 2017 speech at the St. Louis Law Day event. Danforth was instrumental in securing Thomas' first job out of law school, his last job as an Associate Justice of the Supreme Court, and every position in between. Thomas's hugely beneficial relationship with John Danforth began in 1974 when Danforth, then Missouri's Attorney General, hired Thomas straight out of law school to serve as one of his assistants.[40] Thomas remained with Danforth for about three years, from 1974 until 1977, when he decided to seek employment in the private sector. "[W]ith a recommendation from Mr. Danforth, he went to work for the Monsanto Chemical Corporation, as an in-house counsel." [41] Monsanto is a massive conglomerate headquartered in Missouri and, reasonably, had an interest in maintaining good relations with the state's public officials.

Once Danforth was elected to the U.S. Senate, he again tapped Thomas to work in his office, this time as a legislative assistant.[42] Thomas was employed by the Senator from 1979 to 1981, when President Reagan nominated Thomas as the Assistant Secretary for Civil Rights in the U.S. Department of Education.[43] Danforth gave Thomas a ringing endorsement.[44] In 1982, Reagan appointed Thomas, whose career was obviously spiraling upward in an unusually fast pace, to become the Chairman of the Equal Employment Opportunity Commission.[45]

In 1989, President Bush nominated Thomas as an appellate judge to the D.C. Circuit. During the confirmation process, Danforth fervently supported his close friend's and protégé's nomination and strenuously defended Thomas against the opposition of

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[37] Danforth was a three-term Republican Senator from Missouri.

[38] *See generally* John C. Danforth, RESURRECTION: THE CONFORMATION OF CLARENCE THOMAS, Viking Press (1994). Three years after Clarence Thomas' confirmation to the Supreme Court, Senator Danforth published an account of the confirmation proceedings. The book is liberally peppered throughout with passages that plainly illustrate the Senator's long-time close professional and personal relationship with Justice Thomas.

[39] Scott Douglas Gerber, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS, N.Y. Univ. Press, at 12 (1999).

[40] *See* Danforth, *supra* note 38, at 5; Andrew Peyton Thomas, CLARENCE THOMAS, A BIOGRAPHY, Encounter Books, at 148-161 (2001); 137 Cong. Rec. S12335 (Aug. 2, 1991).

[41] 137 Cong Rec. S12342 (Aug. 2, 1991).

[42] Danforth, *supra* note 38, at 5; Thomas, *supra* note 40, at 177-80; 137 Cong. Rec. S12335 & S12342.

[43] Thomas, *supra* note 40, at 185-86; 136 Cong. Rec. S2157.

[44] Thomas, *supra* note 40, at 186.

[45] 136 Cong. Rec. S2157.

many of the Senator's colleagues.[46] Danforth's culmination of support for Thomas came during the Supreme Court confirmation proceedings. As one prominent senator stated:

> As a result of his long personal and professional relationship with Clarence Thomas, Jack Danforth felt that the Supreme Court nominee had been unfairly pilloried by the press and certain members of the Senate. He strongly and emotionally defended both Clarence Thomas' character and his credentials to serve on the Supreme Court. Clarence Thomas' ultimate confirmation to serve on the U.S. Supreme Court can in no small measure be attributed to the efforts of Senator Jack Danforth.[47]

In his 2007 memoir, My Grandfather's Son, Thomas mentions Danforth's interventions into his personal financial matters, including a particular financial crisis involving a default of one of Thomas' student loans:

> "[O]ur financial situation was no laughing matter, and it became deadly serious when a bank foreclosed on one of my student loans. [...] Nobody at the bank had time to listen to me, so I called the regional office of the Department of Health, Education, and Welfare, which supervised the student-loan program. The man to whom I spoke suggested that I try to get a consumer loan to repay the bank, but because of my low salary and lack of credit history, I assumed that no one would be willing to take a chance on me. Once again, the attorney general saved the day: I mentioned my problem to him, and he referred me to the president of a local bank, a friendly small-town type who believed that character matters as much as collateral. He took Jack Danforth's word for my character and agreed to lend me the money. "Don't disappoint me," he said as I left his office. I didn't.[48]

Thus, for 17 years prior to his participation in the *Alpo* case, Clarence Thomas reaped huge benefits from his mentor and primary patron in government, both in terms of financial remuneration and status. Thomas was deeply indebted to Danforth - at every elevation of his career, Senator Danforth was either the person who hired Thomas directly or acted as his number one cheerleader. This was not merely a casual nor even a collegial relationship; it was a long term, intimate friendship and professional collaboration that

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[46] Cong. Rec. S2025-30. (Mar. 5, 1990) (statement of Senator Danforth). Addressing his comments to the opposition of some senators to Thomas' D.C. Circuit nomination, Danforth declared "I rise to address the Senate as a person who has known Clarence Thomas not for a few hours or for a day, but I have known him for 16 years." *Id.* at S2025. So exuberant was Danforth's support and defense of his protégé that it moved Senator Simpson, of Wyoming, to comment:

> I have been through these hearings before, with regard to judgeships. Some of them are quite anguishing. I think, in regards to this nomination, we should put a great deal of credence in the statements of my colleague from Missouri [Senator Danforth], for whom I have a great deal of respect. He knows Clarence Thomas and in all my time here, I have never heard a more moving and extraordinary presentation about a man's record and philosophy and character than I did when Senator Danforth appeared before the Judiciary Committee that day when Clarence Thomas's name was presented.

Id. at S2027.

[47] 140 Cong. Rec. S 14220 (Oct. 5, 1994) (statement of Senator DeConcini).

[48] Clarence Thomas, MY GRANDFATHER'S SON, Harper, at 201 (2007).

culminated, for Thomas, in what can only be regarded as a mercurial rise to one of the most powerful positions in the United States government.

B. Danforth's Significant Connections with Ralston-Purina

William Danforth, the Senator's paternal grandfather, founded the Ralston-Purina Company in 1894. He managed the company for much of the first half of the Twentieth Century, and made it, for many years, one of the country's 100 largest corporations. Later, Donald Danforth, the Senator's father, served as chairman of the company. At about the time Clarence Thomas wrote the decision in the *Alpo* case, Senator Danforth reportedly owned Ralston-Purina stock worth between $7.5 million and $8.5 million (between $15 million and $17 million in today's dollars), making him one of the wealthiest members of the Senate at the time.[49]

Two of Danforth's brothers were also then members of the company's board of directors and each also owned significant stock in Ralston Purina, collectively as much as 6.5 percent.[50] His brother William Danforth was also Chancellor and a trustee of Washington University, which itself was a large stockholder in the company, a holder of as much as 7.17 percent of the stock.[51] Therefore, when the *Alpo* case was assigned to Thomas, John Danforth and his family were not only closely identified with Ralston-Purina since its formation, but also had huge financial and corporate interests in the company and its goodwill. In fact, it appears that the *Alpo* court's reversal of the $10 million award against Ralston Purina may have had a significant beneficial effect on Senator Danforth's and his family's fortunes. In the three business days following Judge Thomas' decision in *Alpo*, Ralston's stock price increased five dollars a share.[52] While only an estimate because publicly available financial statements reflecting Senator Danforth's stock holdings at the time are vague, this $5 increase in Ralston Purina's stock price resulted in an increase of the Senator's holdings by roughly $440,000 (almost

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[49] *See* Monroe Freedman, *Thomas' Ethics and the Court -- Nominee 'Unfit to Sit' For Failing to Recuse in Ralston Purina Case*, Legal Times, Vol XIV, 20, 23 (1991). In this article, Monroe Freedman, a legal ethics professor at Hofstra University, was one of very few legal scholars to publicly call attention to Thomas' possible violation of judicial ethics by failing to recuse himself from the *Alpo* case. A handful of other short articles appeared in the legal and mainstream press within a few weeks preceding and following Mr. Freedman's article. *See e.g*. *League Neutral on Thomas*, St. Louis Post-Dispatch, p. IA (Jul. 22, 1991), 1991 WLNR 502075 (reporting that Danforth owned at least $8 million in stock); James Crowley, *Liberal Group Says Thomas Should Not Have Decided Case*, Associated Press (July 22, 1991). (reporting that Danforth owned more than $8.5 million in Ralston Purina stock); Ronald Rotunda, *Stop the Smear Campaign Against Thomas*, Texas Lawyer, p. 12 (Sept. 2, 1991). The press and legal scholarly community largely ignored the issue, and the Senate almost completely ignored it during the Thomas confirmation hearings. Professor Freedman surmised that one of the reasons the Senate Judiciary Committee deep-sixed the Thomas/*Alpo* ethical flap was "because of the threat of 'blackmail' brought by an attack on the ethics of Sens. Joseph Biden, Ted Kennedy and Alan Cranston. The three were the subject of a television ad produced by a pro-Thomas group called Conservatives for Victory." *The Thomas Hearings*, 78 A.B.A.J. 50, 51 (Jan. date, 1992).

[50] Freedman, *supra* note 48, at 23. Senator Danforth and his two brothers collectively controlled over 5 percent of Ralston-Purina's stock at the time. *Thomas' Impartiality Questioned; Group Cites Ralston-Purina Case; District Judge Endorses Nominee*, Seattle Post-Intelligencer, p. A3 (Jul. 22, 1991), 1991 WLNR 1388116. Another source reported in 1989 that brothers William and Donald Danforth collectively owned as much as 6.5 percent of the company's stock, in addition to the Senator's holdings, according to filings at the Securities and Exchange Commission. Sabrina Eaton, States News Service (Oct. 23, 1989).

[51] *Id.*

[52] Ralston Purina's share price on Sept. 6, 1990, the day before the issuance of the *Alpo* decision, was $92 and 3/8. By Sept. 12, 1990, the price had jumped to $97 and 3/8, an increase of $5 per share within the first three business days following the decision.

$900,000 in today's dollar) in less than a week.[53] Apart from the court's issuance of the *Alpo* decision, nothing else of a material nature was reported to have transpired that week to explain an almost 6 percent rise in the stock price.[54]

C. The Judicial Ethics Rules Required Thomas to Recuse Himself in *Alpo*

Canon 2 of the Code of Judicial Conduct mandates that federal judges "avoid" impropriety and the appearance of impropriety in all activities.[55] Canon 2(a) requires federal judges to "respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[56] The Code of Conduct sets the general parameters with respect to the ethical obligations of federal judges. Canon 3(e)(1) mandates that "a judge shall disqualify himself or herself in a proceeding in which his impartiality might reasonably be questioned."[57]

In 1974, the spirit of these canons was more precisely codified in 28 U.S.C. §455(a) of the Judicial Code, which requires judges to recuse themselves when their impartiality is reasonably at issue. Section 455(a) states as follows:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. [58]

The recusal statute stands for the fundamental principle of justice and due process that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."[59] In other words, "justice must satisfy the appearance of justice."[60]

The standard for recusal under section 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge's impartiality.[61]

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[53] Based on the stock price generally in 1990 and the reports that Danforth owned between $7.5 million and $8.5 million in Ralston Purina stock, the Senator owned in the area of 85,000 to 100,000 shares. During and after Thomas' confirmation hearings, Senator Danforth curiously denied that he had any interest in the outcome of the *Alpo* case. Danforth, *supra* note 37, at 13; Statement of Senator Danforth, (Jul. 19, 1991), Papers of Lee Liberman, George H. W. Bush Presidential Library. Given his and his family's significant stockholdings in Ralston Purina at the time of the *Alpo* decision, and his family's close association with the company and its goodwill for almost a century, Danforth's assertion that he "had no interest in the outcome" seems disingenuous.

[54] Some may criticize the author's potential linkage of the sharp rise in Ralston Purina's stock price three days following the *Alpo* decision to the D.C. Circuit's vacatur of the $10.4 million damages award as conjecture. Such criticism would be somewhat warranted – it is conjecture, but it is reasonable conjecture, which is all we are left with. This conundrum is precisely why the Code of Judicial Conduct and 28 U.S.C. § 455 are in effect, to avoid the need to engage in speculation in order to assess the aftermath of a potential ethical violation.

[55] ABA Model Code of Judicial Conduct, Canon 2.

[56] ABA Model Code of Judicial Conduct, Canon 2A.

[57] ABA Model Code of Judicial Conduct, Canon 3(e)(l).

[58] 28 U.S.C. 455(a) (emphasis added). The 1974 standard employs and objective standard. Before 1974, the recusal statute used a subjective standard requiring recusal only if "in his opinion" a judge believed that he should not participate in a case.

[59] *Commonwealth Coatings Corp. v. Continental Casualty Co*., 393 U.S. 145, 150 (1968).

[60] *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (*quoting In re Murshison*, 349 U.S. 133, 136 (1955)).

[61] *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991). *See also In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001); Richard E. Flamm, JUDICIAL DISQUALIFICATION, § 24.2.1 (1996).

Thus, violations of the Code of Conduct may give rise to a violation of section 455(a) if doubt is cast on the integrity of the judicial process. While section 455(a) is concerned with actual and apparent impropriety, the statute requires recusal even when a judge's "impartiality might reasonably be questioned."[62]

The paramount principle of requiring judicial disqualification to preserve the "appearance of impartiality" was well established in 1988 by the Supreme Court in *Liljeberg v. Health Servs. Acquisition Corp*., a case decided three years before the *Alpo* decision. In *Liljeberg*, a federal district judge was a trustee of Loyola University in New Orleans. While the university was not a party to the case, it had a significant interest in the outcome. The judge at one time knew of Loyola's interest but had forgotten and did not associate Loyola with the case when he decided the matter. The judge's decision indirectly benefited the university.

After learning of the judge's relationship with Loyola, the losing party moved to vacate the decision and sought a new trial. The Supreme Court agreed, and vacated the prior decision. The court explained that, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."[63]

Similar to the judge in *Liljeberg*, by failing to recuse himself in *Alpo*, or even to advise the parties of his close personal ties to a patron to whom he owed his entire career, Thomas crossed the line. Viewed in the context of the long-term and intimate relationship Thomas had with his professional sponsor, Senator Danforth, and the immense benefits he reaped from that relationship extending back over 17 years, Thomas' participation in the *Alpo* case would naturally lead a reasonable, informed observer to question Thomas' impartiality.

Is it possible that a reasonable person would believe Judge Thomas was unaware of or had forgotten about his long-time patron's significant ties with and financial interests in Ralston-Purina? Justice Thomas himself removed all doubt on that score when, in his 2007 memoir, Thomas described the first time he met Danforth. The description demonstrates Thomas was acutely aware of Danforth's familial and financial relationship with Ralston Purina from the moment they met:

> "Clarence, there's plenty of room at the top," the attorney general said as we sat down to talk. That's easy for you to say, I thought, knowing that he was one of the heirs to the Ralston Purina fortune and had been elected attorney general of Missouri while he was still in his early thirties. Maybe there was room at the top for people like him, but so far I hadn't even managed to find it at the bottom.[64]

Would a reasonable person believe that the D.C. Circuit's vacatur of a $10 million-dollar award would have no beneficial effect on Ralston-Purina and its major stockholders such as the Danforth family? Objectively speaking, there would have been little question that a reversal of the $10 million award in Ralston-Purina's favor would have a beneficial

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[62] 28 U.S.C. § 455(a).
[63] *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 865 (1988).
[64] Thomas, *supra* note 48, at 87.

impact on the company and its major stockholders, such as Danforth and his family. Indeed, it did.

The fact that Danforth himself was not a party in *Alpo* is irrelevant. Danforth clearly had a significant financial and, because of his family's century-old ties with Ralston, reputational stake in the outcome of the *Alpo* litigation. The Supreme Court in *Liljeberg* confirmed that a judge's relationship with a non-party could lead to the appearance of impartiality if that non-party has a significant interest in the outcome of the litigation. A number of federal appellate courts have also required disqualification in other circumstances in which a judge enjoyed a close or longstanding friendship with a nonparty who had a significant interest in the outcome of the litigation.

For example, in *U.S. v. Jordan*, 49 F.3d 152 (5th Cir. 1995); the Court of Appeals for the Fifth Circuit found that the district court had abused her discretion in not recusing herself based on the judge's close and longstanding friendship with a non-party who had hostile relations with a criminal defendant. *Id*. at 156-57. In *U.S. v. Kelly*, 888 F.2d 732, 738, 745-46 (11th Cir, 1989), the court found a violation of section 455(a) where the trial judge failed to s*ua sponte* recuse himself from a case in which the husband of a close friend of the judge's wife would appear as a witness for the defendant. In a case involving political relationships, the Court of Appeals for the Eighth Circuit disqualified a district court judge on remand because the judge was a close friend of Hillary Clinton, a non-party to the litigation, who, together with her husband, was a close friend and political associate of a party. *U.S. v. Tucker*, 78 F.3d 1313, 1324-25 (8th Cir. 1996).

During the 2002 Supreme Court term, Justice Thomas himself recognized the need under section 455(a) to recuse himself in a death penalty review where the defendant was convicted for murdering the father of Judge Luttig of the Court of Appeals for the Fourth Circuit.[65] Citing his "familiarity with Judge Luttig," Thomas recused himself, presumably on the basis that Judge Luttig provided significant support and assistance to Thomas during the Supreme Court confirmation process, just as Senator Danforth had provided crucial support and backing during Thomas' confirmation to the D.C. Circuit. Would a reasonable person distinguish the appearance of impartiality in circumstances where a judge received assistance during confirmation hearings from a non-party with a significant interest in the outcome of one case from circumstances where the judge was, in virtually every step of his career, either directly employed by, or strongly supported by, a non-party with a significant interest in the outcome of another case?

Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges participate in cases in which they, or someone extremely close to them, have a significant interest in the outcome. While such participation may not actually compromise a judge's impartiality - the appearance or possibility of partiality may be all there is – but an appearance or possibility of partiality is enough to invoke the ethical canons and Section 455(a). A judge's failure to recuse himself or herself in circumstances where there may be an objective appearance of impropriety simply compromises what

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[65] Paul Duggan, *Killer of Judge's Father Executed*, Wash. Post, p. A06 (May 29, 2002), https://www.washingtonpost.com/archive/politics/2002/05/29/killer-of-judges-father-executed/050d497a-0932-4d17-ada6-5b2b1831c3a1/. Justices Souter and Scalia also recused themselves in the case. *Id.* During the Supreme Court confirmation proceedings, Luttig was the Assistant Attorney General in charge of the Office of Legal Counsel. *See also*, Danforth, *supra* note 37, at 1. Luttig was assigned by the White House to help prepare Thomas for his confirmation hearings. *Id.*

Edmund Burke justly regarded as the "cold neutrality of an impropriety judge." "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges."[66] Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, decide cases the outcome of which would directly benefit the judge, his or her spouse and family or even a longtime professional friend and patron whose exuberant support and assistance assured a lifetime of success.

During the Thomas Supreme Court confirmation process, the George H. W. Bush White House was sufficiently concerned about the possibility of an ethical violation to invite three law professors specializing in legal ethics to render opinions on whether or not Thomas may have violated the rules of ethics in failing to recuse himself in the *Alpo* case.[67] While White House Counsel Boyden Gray briefly apprised Messrs. Hazard, Rotunda and Johnstone of the history of Senator Danforth's employment and sponsorship of Thomas, the one paragraph description fails to accurately elicit the intimate professional and personal relationship that developed between the two men over a 17-year period prior to the *Alpo* case. Gray's letters certainly did not convey what Thomas himself publicly declared in May 2017 – that Thomas owed his entire career to John Danforth. Gray's letters also parroted Senator Danforth's claim that he and his family had no significant interest in the *Alpo* case, a claim shown to be factually incorrect.

Professors Hazard and Rotunda provided opinions, each written within two or three days from the time of Boyden Gray's request, that Clarence Thomas did not violate section 455(a).[68] Curiously, the George H. W. Bush Library records do not appear to list any opinion or other response from Professor Johnstone. Professor Hazard's opinion offers little legal analysis except to erroneously confine the scope of the general provisions for recusal under section 455(a) to the context of the specific relationships defined in other narrower subsections of section 455. Hazzard seems to suggest that a violation of the general, catch-all section 455(a) requires conduct that would violate the narrower subsections that describe specific relationships:

> The general provision, which is (455(a), is interpreted in the context of the specific relationships that are defined in other subsection (sic). These other subsections, for example, require disqualification where the judge was previously involved in the case while a lawyer (subsection (b)(2)); or was involved while in a government position (subsection (b)(3)); or where the judge "individually or as a fiduciary, or his spouse, or minor child residing in his household, has a financial interest in the subject matter . . .(subsection (b)(4)). Judge Thomas had none of these relationships of anything close to them.[69]

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[66] 64 ABA, Code of Judicial Conduct, Canon 1, cmt.

[67] *See* letter dated Jul. 24, 1991 from former White House Counsel C. Boyden Gray to Professors Geoffrey Hazard, Ronald Rotunda and Quinton Johnstone, Papers of Lee Lieberman, George H. W. Bush Presidential Library.

[68] *See* letter dated Jul. 26, 1991 from Professor Ronald Rotunda to White House Counsel C. Boyden Gray and letter dated July 27, 1991 from Professor Geoffrey Hazard to C. Boyden Gray, Papers of Lee Lieberman, George H. W. Bush Presidential Library.

[69] Letter dated July 27, 1991 from Professor Geoffrey Hazard to C. Boyden Gray, Papers of Lee Lieberman, George H. W. Bush Presidential Library.

To construe and limit a general catch-all provision (455(a)) to the narrower contexts of subsections of 455(b)(2)-(4) itemizing specific violative relationships renders the general provision superfluous and meaningless. Professor hazard also ignores that the preamble phrasing of section 455(b) reads as follows: "He [the judge] shall **also** disqualify himself in the following circumstances . . ." Thus, on their face, the specific subsections of section 455(b) define additional circumstances requiring recusal separate and apart from the "appearance of Impartiality" standard of section 455(a).

If Professor Hazard is correct in his analysis (which, incidentally, made no mention of any the applicable case law), then the decisions in *Liljeberg v. Health Servs. Acquisition Corp, U.S. v. Jordan, U.S. v. Kelly and U.S. v. Tucker*, discussed above, were wrongly decided. Yet, these cases still define the law of judicial recusal as it applies to 28 U.S.C. § 455(a). Professor Hazard's legal conclusion would also cast doubt on the propriety of Justices Thomas', Scalia's and Souter's recusals in the criminal case involving Judge Luttig's father.

Factually, Professor Hazard engaged in unsupported (and irrelevant) conjecture by suggesting that the impact of the reversal of the $10 million damage award on Ralston-Purina would have been minor, a fact that appears to be debunked by the significant increase in the company's stock price within days after Thomas' decision was issued. He also assumed that "the effect on Danforth's financial situation would have been miniscule if it could be measured at all." As previously noted, the immediate rise in Ralston Purina's stock price netted Senator Danforth a gain of over $400,000 (roughly $900,000 in today's dollars) in less than a week. It is also odd that Professor Hazard would even bother to address his view of the insignificance of the potential harm that Thomas' failure to recuse himself in *Alpo* would have caused, since Hazard is credited by a prominent colleague for his observation that the notion of "no harm, no foul" is "invalid as an ethical proposition."[70]

Professor Rotunda's opinion presents a more thorough and credible legal analysis. But his opinion justifies its conclusion that Thomas committed no ethical violation by ignoring controlling case law and focusing on readily distinguishable cases, far removed from the circumstances Clarence Thomas faced in the *Alpo* case, *i.e.*, (i) the judge rendered a prior adverse judgment against the party; (ii) judge was a casual acquaintance of a party, (iii) party was the state bar, of which the judge was necessarily a member, and an adverse judgment might increase his dues; (iv) party was the homeroom teacher of the judge's child; (v) complaining witness was a classmate and friend of the judge's daughter; etc. Moreover, most of the cases Rotunda cites were state cases based on state law, not on 28 U.S.C. § 455(a).[71]

Professor Rotunda dismissed the applicability of the Supreme Court's opinion in *Liljeberg*, clearly the most relevant decision he discusses, by noting that in *Liljeberg* the judge was found to have violated both the general "appearance of impropriety" provision of section 455(a) as well as the more specific provision of section 455(b)(4) (fiduciary

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[70] Monroe Freedman, *supra* note 49, at 23.

[71] Letter dated Jul. 26, 1991 from Professor Ronald Rotunda to White House Counsel C. Boyden Gray. Not content to simply satisfy the White House over concerns of Thomas' potential ethical gaffs in *Alpo*, Professor Rotunda repackaged his analysis and published it in a series of legal newspapers around the country about a month later, making him Thomas' most vocal cheerleader in the legal press. *See, e.g.*, Ronald Rotunda, *Stop the Smear Campaign Against Thomas*, Texas Lawyer (Sept. 2, 1991); Ronald Rotunda, *Removal Not Needed in Ralston Case*, Conn. Law Tribune (Sept. 9, 1991).

duties to a person having a financial interest), whereas Thomas' failure to recuse himself would only have implicated section 455(a), at most. No case has ever determined that recusal by a judge is required under Section 455(a) only where the judge would also violate a second provision of the statute.

Worse still, as far as his analysis goes, Professor Rotunda also seems to suggest that the Supreme Court determined that the judge's failure to recuse under his knowing violation of subsection 455(b)(4) directly resulted in his violation of the general catch-all provision of section 455(a). "In Liljeberg, the trial judge knew, on March 24, 1982, that he was violating § 455(b)(4). His failure to disqualify himself at that point led also to a violation of § 455(a), as the Supreme Court pointed out." In other words, Rotunda assumes that the Court linked liability under Section 455(a) specifically to the judge's knowing violation of subsection 455(b)(4), somewhat echoing Professor's Hazard's erroneous analysis, discussed above, requiring a violation of a 455(b) subsection for there to be a violation of section 455(a).

The Supreme Court did no such thing. It affirmed the appellate court's finding of a violation of Section 455(a) after a full examination of the law governing that section in Part III of the *Liljeberg* opinion. The Court then conducted a separate analysis of the judge's conduct under subsection 455(b)(4) and section 455(c) in Part VI of the opinion. It imposed no linkage requirement to find separate and independent liability under any of these provisions.

CONCLUSION

Disqualification is mandatory in circumstances that call a judge's impartiality into question.[72] The statute is meant to be self-enforcing.[73] The decision in *Alpo v. Ralston Purina,* which substantially changed the law of the D.C. Circuit in numerous respects,[74] was rendered by a judge who unaccountably failed to recuse himself under Section 455(a) when he should have done so. Nevertheless, there were no consequences. There were also no consequences when Thomas failed to recuse himself in *Gore v. Bush* despite the fact that his wife was actively assisting George Bush in selecting and recruiting candidates for

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[72] See 28 U.S.C. § 455(a); *In re School Asbestos Litig*., 977 F.2d 764, 783 (3d Cir. 1992).

[73] *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982); 28 U.S.C. §144.

[74] In addition to treating corrective advertising relief as profits rather than legal damages, as was historically the case, the *Alpo* decision also expressly held that the deterrence theory alone cannot justify an award of profits in trademark and false advertising cases. *Alpo*, 913 F.2d at 969. Previously the D.C. Circuit and all other circuits recognized that profits could be awarded on any one of three grounds: (1) as a rough surrogate of the plaintiff's damages, (2) under principles of unjust enrichment, and (3) to deter future offensive conduct. *See* Stolte, *supra* note 8, at 283-92; *see also Foxtrap, Inc. v. Foxtrap, Inc*., 671 F.2d 636, 641 (D.C. Cir. 1982) (stating that it was "customary", as opposed to mandatory, that a Lanham Act plaintiff show bad faith to obtain profits, but also stating that even where no bad faith is shown, profits can be available under the unjust enrichment basis). Curiously, Thomas' opinion in *Alpo* seems to merge the unjust enrichment basis for recovery into the deterrence theory, despite the long existence of the three mutually separate bases for awarding profits. *Alpo*, 913 F.2d at 968. The unjust enrichment theory of trademark profits has long been grounded on the restitutional concept of "*trust ex maleficio*". *Hamilton-Brown Shoe co. v. Wolf Bros. & Co*., 240 U.S. 251, 259 (1916). This theory has nothing to do with deterrence, or bad faith for that matter. Thus, Thomas' decision in *Alpo* substantially narrowed the circumstances in which a trademark or false advertising plaintiff may obtain an award of profits or corrective advertising damages, at least within the D.C. Circuit.

official positions in his future administration.[75] Nor were there any consequences when Thomas failed to account for his wife's income of about $700,000 over a six-year period in annual financial statements he filed.[76] The Supreme Court has explained that Congress "delegated to the judiciary the task of fashioning the remedies that will best serve the purpose" of the disqualification statute.[77] It remains to be seen whether Thomas will face consequences for his failure to recuse himself in *Trump v. Thompson* in the face of his wife's active involvement in Donald Trump's efforts to overturn the 2020 election result.

[75] Christopher Marquis, *Job of Clarence Thomas' Wife Raises Conflict of Interest Questions*, New York Times (Dec. 12, 2000), https://www.nytimes.com/2000/12/12/us/contesting-vote-challenging-justice-job-thomas-s-wife-raises-conflict-interest.html?ref=virginia_lamp_thomas.
[76] Kim Geiger, *Clarence Thomas Failed to Report Wife's Income, Watchdog Says*, Los Angeles Times (Jan. 22, 2011), https://www.latimes.com/politics/la-xpm-2011-jan-22-la-na-thomas-disclosure-20110122-story.html.
[77] *Liljeberg*, 486 U.S. at 862.

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