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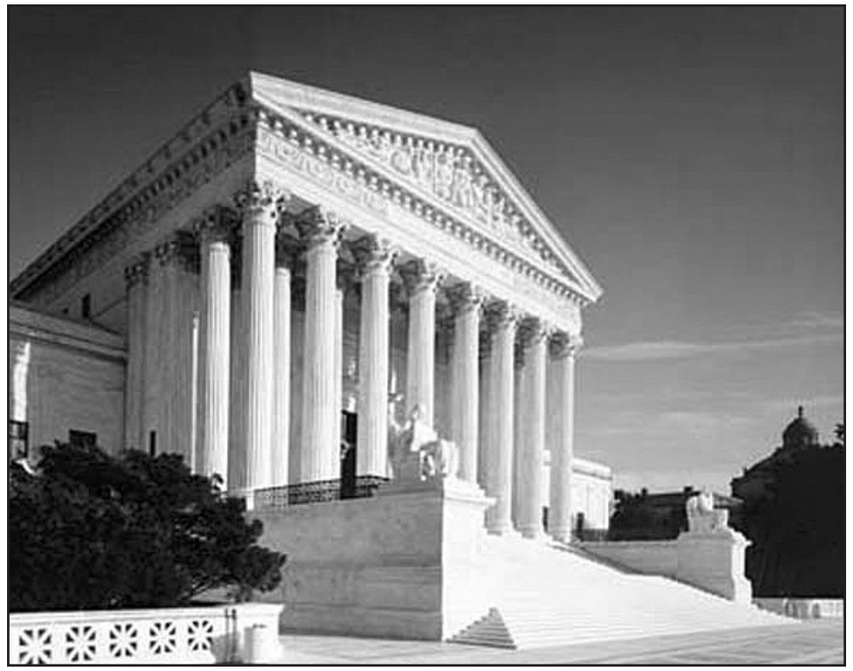

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1. Papers should be no more than 20 single-spaced pages, including footnotes. Use font 12 pitch, Times New Roman. Skip lines between paragraphs and between section titles and paragraphs. Indent paragraphs 5 spaces. Right-hand justification is desirable, but not necessary.
2. Margins: left and right hand margins should be set at 1 ¼ inches, top margin at 1 ½ inches and bottom margin at 1 ¾ inches.
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NORTH EAST JOURNAL OF LEGAL STUDIES

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ARTICLES

PEDAGOGY

RELIGIOUS LIBERTY IN A DIVERSE SOCIETY

by

Elizabeth A. Marcuccio*
Laura Durham**

I. INTRODUCTION

Every first-year law student learns that when the government infringes on a fundamental right, the law or government action in question is subject to strict scrutiny; the government must show that is has a *compelling* purpose to override a fundamental constitutional right. The Free Exercise Clause of the U.S. Constitution states that no person can be compelled to do something contrary to his or her religious beliefs. However, in its 1990 ruling in *Oregon v. Smith*[1] the U.S. Supreme Court stripped religious liberty of the protections afforded other fundamental rights. This article will examine how federal and state governments have reacted to this decision, and the unanticipated difficulties that have resulted.

II. OREGON v. SMITH

Employees Smith and Black were fired by a private drug rehabilitation clinic because they ingested peyote, a

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hallucinogenic drug, as part of their religious ceremonies.[2] They were members of the Native American Church, at which sacramental peyote use was well documented. Their applications for unemployment compensation were denied by the State of Oregon due to a state law that disqualified employees from receiving unemployment benefits if discharged for work-related "misconduct". At the time, intentional possession of peyote was a crime under Oregon law, with no affirmative defense for religious use.[3] Holding that the denial of unemployment compensation violated the respondents' First Amendment free exercise rights, the State Court of Appeals reversed the decision, and the State Supreme Court affirmed. However, the U.S. Supreme Court vacated the judgment and remanded the case for a determination as to whether sacramental peyote use was prohibited by Oregon's controlled substance law. This law makes it a felony to knowingly or intentionally possess the drug.[4] Pending that determination, the U.S. Supreme Court refused to decide whether such use was protected by the Constitution. On remand, the Oregon Supreme Court held that sacramental peyote use violated, and was not excepted from, the state law prohibition. However, the Court further concluded that the prohibition was not valid under the Free Exercise Clause. The state unemployment division appealed to the U.S. Supreme Court, again arguing that the denial of Smith's and Black's unemployment benefits was proper because possession of peyote was a crime.[5]

In a surprising departure from precedent, the U.S. Supreme Court held that Oregon's prohibition of sacramental peyote was valid under the Free Exercise Clause, and therefore the state could deny unemployment benefits to persons discharged for such use.[6] The majority stated that "any otherwise valid law" defeats a claim to religious liberty. It further stated that the First Amendment does not entitle a religious objector to an exemption “from obedience to a general law,” otherwise

"every citizen (would) become a law unto himself."[7] Of particular importance was the fact that the Oregon law was not specifically directed at the Native Americans' religious practice; thus, it was deemed constitutional when applied to all citizens.

In concurring and dissenting opinions, three Supreme Court justices vehemently disagreed with the majority's position in *Smith.* They argued that, consistent with the Court's precedents and its treatment of other fundamental rights, religious freedom could not be abridged unless the government had a *compelling* reason to do so, such as forbidding human sacrifice or requiring medical care for gravely ill children.[8]

As a result of the majority opinion in *Smith,* free exercise of religion is the only fundamental right that is not protected by the "compelling interest" test, requiring strict scrutiny by the Court. If the government no longer must have a compelling interest, minority religions would have to make exceptions to their beliefs and practices to comply with specified laws. The government no longer had to make exceptions to its laws or rules to obey the Constitution's guarantee of religious freedom. To restore the "compelling interest" test, in 1993 Congress passed the Religious Freedom Restoration Act (RFRA),[9] stating that a religiously neutral law can burden a religion to the same extent as a law that intended to inhibit religious practices.

III. RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act (RFRA) was introduced by Congressman Chuck Schumer on March 11, 1993. A companion bill was introduced in the Senate by Ted Kennedy that same day. A unanimous U.S. House and a nearly unanimous U.S. Senate passed the bill, and President Clinton signed RFRA into law on November 16,

1993.[10] RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[11] A government interest is compelling when it is more than routine and does more than simply improve government efficiency. RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[12]

RFRA clearly applies "to all Federal law, and the implementation of that law, whether statutory or otherwise", including any Federal statutory law adopted after RFRA's date of signing "unless such law explicitly excludes such application."[13] Originally, Congress intended that RFRA apply to actions by state and local governments. However in 1997, in *City of Boerne v. Flores,*[14] the Supreme Court struck down RFRA with respect to states and other local municipalities within them, stating that Congress had exceeded its power as provided in the Fourteenth Amendment. This resulted in many states passing their own versions of the Religious Freedom Restoration Act. These Acts apply to laws passed and actions taken by individual state and local governments.

IV. STATES AND RELIGIOUS LIBERTY

To what extent do various states protect their citizens' religious freedoms when a state or local law attempts to violate religious liberty? Currently thirty-one (31) states have protections for their citizens, which can be classified into two categories:

1. Twenty-one (21) states have passed RFRA-like statutes; and

2. Ten (10) states[15] have RFRA-like provisions that were provided by state Court decisions rather than by legislation.

The following twenty-one (21) states have passed RFRA-like statutes: Alabama,[16] Arizona,[17] Arkansas,[18] Connecticut,[19] Florida,[20] Idaho,[21] Illinois,[22] Indiana,[23] Kansas,[24] Kentucky,[25] Louisiana,[26] Mississippi,[27] Missouri,[28] New Mexico,[29] Oklahoma,[30] Pennsylvania,[31] Rhode Island,[32] South Carolina,[33] Tennessee,[34] Texas,[35] and Virginia.[36] Two states, Connecticut and Rhode Island, passed their acts prior to the 1997 *Boerne* decision. The remaining nineteen (19) states passed RFRA-like statutes as a direct response to *Boerne.*

State RFRA laws require the "Sherbert Test," which was set forth by *Sherbert v. Verner*,[37] and *Wisconsin v. Yoder*,[38] mandating that strict scrutiny be used when determining whether the Free Exercise Clause has been violated. However, state RFRAs contain unique provisions beyond this basic principle. For example, five states[39] do not require the burden or restriction on religion to be "substantial." While the Supreme Court has not distinguished between "substantial burden" and "burden" in the context of state RFRAs, some decisions have attempted to distinguish the terms. Some states define "burden" or "substantial burden" within their statutes, and these definitions vary. Burdens must be greater than "trivial" or "de minimis infractions" in Arizona and Idaho. They are defined as actions that would "inhibit or curtail religious practice" in Oklahoma, Tennessee and Virginia. In contrast, Kansas, Kentucky, Louisiana and Pennsylvania list examples of specific burdens in their RFRAs.[40]

Arkansas, Indiana and Texas provide that their states' RFRA can be invoked even when the government is not involved in the lawsuit. Under the Arkansas law, religious rights can be invoked to obtain an injunction or damages against an individual who insists that a person complies with a state regulation that violates that person's religious beliefs. Indiana's law similarly allows religious rights to be invoked as a claim or a defense in a private civil lawsuit. Texas allows its law to be used only as a defense "without regard to whether the proceeding is brought in the name of the state or another person."[41] In the remaining eighteen (18) states with RFRA-like statutes, the lawsuit must be invoked against the government, presumably in response to the laws that restrict a person's religious practices.

Congress' passage of RFRA in 1993 was meant to restore the "compelling interest" test, requiring strict scrutiny by the Court, whenever an individual's religious liberty was being infringed. However, some states have passed laws that specifically allow discrimination on the basis of sexual orientation. Indiana allows business owners who object to same-sex couples on religious grounds to opt out of providing them services. A Mississippi law protects people who refuse to serve others on the basis of a religious objection to same-sex marriage, transgender people, or extramarital sex from government punishment. South Dakota has a law that allows taxpayer-funded adoption agencies to deny services under circumstances that conflict with their religious beliefs.[42] It is ironic that a statute originally conceived of as protecting religious diversity has become a symbol of intolerance.

While protecting an individual's religious liberty should be seen as a good and noble mission, much controversy has surrounded RFRA laws in recent years. One reason is the Supreme Court's interpretation of the federal RFRA in the

Hobby Lobby case.[43] A second development was the legalization of same-sex marriage in the United States, and the subsequent concern that the public accommodation laws would not protect same-sex couples from the discrimination that some state RFRA laws allow.

V. BURWELL v. HOBBY LOBBY

Hobby Lobby Stores, Inc. is an arts and crafts company founded and owned by the Green family, who are Evangelical Christians. It provided health insurance for its approximately 21,000 employees until 2012, when it dropped its coverage. Hobby Lobby did not wish to provide coverage for certain types of FDA-approved contraceptives for its female employees which they considered abortion.[44] Under the Patient Protection and Affordable Care Act (ACA), employment-based group health care plans must provide certain types of preventative care, which included the aforementioned FDA-approved contraceptive methods. While there are exemptions available for religious employers and non-profit religious institutions, there were no exemptions available for for-profit institutions such as Hobby Lobby Stores, Inc.[45]

In September 2012, the Greens, as representatives of Hobby Lobby Stores, Inc., sued the Department of Health and Human Services, and challenged the contraception requirement. As plaintiffs they argued that the requirement that the employment-based group health care plan cover contraception violated the Free Exercise Clause of the First Amendment and the federal RFRA. The plaintiffs sought a preliminary injunction to prevent the enforcement of tax penalties, which the district court denied and a two-judge panel of the U.S. Court of Appeals for the Tenth Circuit affirmed. The Supreme Court also denied relief, and the plaintiffs filed for an en banc hearing of the Court

of Appeals. This hearing resulted in a reversal, and it was held that corporations were "persons" for the purposes of RFRA and therefore had protected rights under the Free Exercise Clause of the First Amendment. The Department of Health and Human Services appealed to the U.S. Supreme Court.[46]

In June 2014 the U.S. Supreme Court held that Congress intended for RFRA to be read as applying to closely held corporations, since they are composed of individuals who use them to achieve desired ends. Because the contraception requirement forces religious corporations to fund what they consider abortion, which goes against their stated religious principles, or face significant fines, it creates a substantial burden. The ruling was reached on statutory grounds, citing RFRA, because the mandate was not the "least restrictive" method of implementing the government's interest. In fact, a less restrictive method already existed in the form of the Department of Health and Human Services' exemption for non-profit religious organizations, which they treated as "persons" within the meaning of RFRA. The Court held that this exemption can and should be applied to for-profit closely held corporations such as Hobby Lobby.[47]

The ruling did not address Hobby Lobby's claims under the Free Exercise Clause of the First Amendment, but solely by applying RFRA. "Congress, in enacting RFRA, took the position that 'the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests' ... The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the Department of Health and Human Services contraceptive mandate is unlawful.[48]

It is interesting to note that three states had already specifically defined "person" in their state RFRAs to include corporations. Two states, Indiana and South Carolina, define a person as, among other things, a corporation, and Kansas defines a person as "any legal person or entity" under Kansas or federal law.[49] So why is *Hobby Lobby* considered a landmark case? It was the first time that the Supreme Court made it clear that for-profit, closely held corporations can assert religious rights. Are these businesses now exempt from the anti-discrimination provisions of the public accommodation law?

VI. PUBLIC ACCOMMODATION LAW

Under federal law, public accommodations may not discriminate. A place of public accommodation is defined as: "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind."[50] Private clubs and religious organizations are specifically exempted from this definition. Therefore, for-profit public accommodations, regardless of the nature of the goods and services provided, may not discriminate on the basis of any classification prohibited by federal or state law.

Now that for-profit, closely held corporations can assert religious rights, may they claim that the public accommodation law substantially burdens their exercise of religion by requiring them to act in contravention of their religious beliefs? For example, conservative Christians and others argue that they have a sincere religious belief that marriage must be only between one man and one woman. Facilitating or assisting individuals to enter other kinds of marital relationships requires them to act

against their religious beliefs. It seems to follow that only if the state can show it has a compelling interest in requiring these businesses to take part, they will be excused from participating in the marriage festivities of same-sex couples. To remedy this, nineteen (19) states have public accommodations laws that explicitly protect against discrimination on the basis of sexual orientation.[51] Is this necessary? Long ago the public accommodations section of the Civil Rights Act of 1964 established the principle that those who open their doors for business must serve all who enter. Is the Supreme Court's decision in *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission* consistent with this principle?[52]

The baker in *Masterpiece Cakeshop* refused to create a custom cake for a same-sex couple's wedding celebration on religious grounds. It was the baker's sincerely held religious belief that marriage should be only between one man and one woman.[53] At the time same-sex marriage was illegal in Colorado. The couple filed a grievance with the Colorado Civil Rights Commission, and the state determined that the baker violated Colorado state law, which provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of .....sexual orientation..... the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accomodation.[54]

The U.S. Supreme Court reversed the state's decision on the basis of religious freedom, even though the baker asserted that both his freedom of speech and freedom of religion had been violated. The key factor leading to the reversal was the Court's

determination that Colorado's Civil Rights Commission did not give neutral and respectful consideration to the baker's claims. The Commission's treatment of the case had some elements of clear and impermissible hostility toward the sincere religious beliefs that motivated the baker's objection.[55]

The Commission disparaged the baker's religious faith by describing it as despicable and characterizing it as insubstantial and even insincere. The government, consistent with the Constitution's guarantee of free exercise of religion, cannot impose regulations that are hostile to the religious beliefs of citizens and cannot act in a manner that passes judgment upon the legitimacy of religious beliefs and practices. Because the Commission treated the baker's beliefs with contempt, it failed to conduct a fair hearing, and for that reason the Court sided with the baker.[56] The Court made it clear that while religious objections to same-sex marriage are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.[57] The outcome would have been different if the baker had initially received a fair hearing.

VII. CONCLUSION

Our nation was founded on the principle of religious freedom. Our laws protect people from governmental intrusion in the practice of their faith, as long as that practice does not run afoul of a compelling governmental interest. It has long been the task of the Supreme Court to balance the competing rights of individuals, and this task has become exceedingly difficult in our diverse society. Individuals have the right to live their lives free from discrimination, especially when entering a place of

business engaged in sales to the general public. It seems clear that businesses cannot discriminate against individuals because of their sexual orientation; a bakery cannot refuse to sell baked goods to gay customers. However, must a baker who disapproves of same-sex marriages on religious grounds provide a wedding cake to celebrate a same-sex marriage? If the couple can easily purchase a cake elsewhere, is it necessary to force compliance? In the face of repeated lawsuits and personal attacks, religious conservatives have been asking, "Where are my rights?" A reasonable accommodation should be made for religious objectors when the accommodation is workable, and the underlying governmental purpose is still achieved.

But beware: Not every religious practice or belief can be, or need be accommodated. When the law in question serves an overriding societal purpose, it is not readily susceptible to reasonable accommodations; any accommodation for religion would be unreasonable. Therefore, it can be argued that allowing religious objectors to discriminate on the basis of sexual orientation is an unreasonable accommodation because these laws are essential to societal health, safety and welfare.

ENDNOTES

[1] *Oregon v. Smith*, 494 U.S. 872 (1990).
[2] *Id* at 872.
[3] *Id.*
[4] *Id.*
[5] *Id.*

[6] *Id.* at 876-890.
[7] *Id.* at 879-880.
[8] *Id.* at 892-922.
[9] 42 U.S.C. § 2000bb - 42 U.S.C. § 2000bb-4 .
[10] www.justice.gov/jmd/religious-freedom-restorstion-act-1993-pl-103-141#bills. Three senators voted against passage.
[11] *Id.* at §§2000bb–1(a), (b).
[12] *Id.* at §2000cc–5(7)(A).
[13] *Id.* at § 2000bb–3.
[14] *City of Boerne v. Flores,* 521 U.S. 507 (1997).
[15] Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin. Griffin, Jonathan, *"Religious Freedom Restoration Acts,"* National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[16] Ala. Const. Art. I, §3.01.
[17] Ariz. Rev. Stat. §41-1493.01.
[18] 2015 SB 975
[19] Conn. Gen. Stat. §52-571b.
[20] Fla. Stat. §761.01, *et seq.*
[21] Idaho Code §73-402.
[22] Ill. Rev. Stat. Ch. 775, §35/1, *et seq.*
[23] 2015 SB 101*;* 2015 SB 50
[24] Kan. Stat. §60-5301, *et seq.*
[25] Ky. Rev. Stat. §446.350.
[26] La. Rev. Stat. §13:5231, *et seq.*
[27] Miss. Code §11-61-1.
[28] Mo. Rev. Stat. §1.302.
[29] N.M. Stat. §28-22-1, *et seq.*
[30] Okla. Stat. tit. 51, §251, *et seq.*
[31] Pa. Stat. tit. 71, §2403.
[32] R.I. Gen. Laws §42-80.1-1, *et seq.*
[33] S.C. Code §1-32-10, *et seq.*
[34] Tenn. Code §4-1-407.
[35] Tex. Civ. Prac. & Remedies Code §110.001, *et seq.*

[36] Va. Code §57-2.02.
[37] *Sherbert v. Verner,* 374 U.S. 398 (1963).
[38] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).
[39] Alabama, Connecticut, Missouri, New Mexico and Rhode Island. Griffin, Jonathan, *"Religious Freedom Restoration Acts,"* National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[40] Griffin, Jonathan, *"Religious Freedom Restoration Acts,"* National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[41] *Id.*
[42] *Id.*
[43] *Burwell v. Hobby Lobby,* 573 U.S. ____ (2014).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Griffin, Jonathan, *"Religious Freedom Restoration Acts,"* National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[50] www.definitions.uslegal.com
[51] www.ncls.org. California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington State, as well as the District of Columbia.
[52] *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission,* 584 U.S. ____ (2018).
[53] *Id.*
[54] Colo. Rev. Stat. §24-34-601(2)(a) (2017).
[55] *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission,* 584 U.S. ____ (2018).
[56] *Id.*
[57] *Id.*

GLOBAL TAX GOVERNANCE OR NATIONAL TAX DISCRIMINATION: THE CASE OF THE EU VS. APPLE

by

John Paul*

I. INTRODUCTION

On August 30, 2016, the European Commission (EC) concluded that Ireland and Apple Inc. (Apple) had violated the European Union (EU) state aid rules when Ireland granted tax advantages to Apple; therefore, the EC ordered Ireland to collect up to €13 billion euros ($15.3 billion U.S. dollars) in tax underpayments from Apple for the 2003 to 2014 period.[1] The amount at issue makes this case one of the largest tax controversies in history and has generated a lot of press as a result.[2]

While the amount in the EC vs. Apple case is unprecedented, it is only one of several EC Decisions dealing with the taxation of multinational transfer pricing activities issued recently, possibly in response to both a United States (U.S.) Senate investigation into U.S. multinational tax practices and the "Luxembourg Leaks" documents released by the International Consortium of Investigative Journalists.[3] Arguing that each multinational firm received illegal state aid, the EC has

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recently initiated or finalized decisions adverse to Google[4], Starbucks,[5] Apple[6] and Amazon[7] based on the specific transfer pricing methodologies each used with the endorsement of tax authorities in several EU member states.[8]

Each of the EC's Decisions finds that a EU Member State granted state aid in violation of the Treaty on the Function of the European Union (TFEU), Article: 107(1).[9] The EC found that each of the rulings at issue provided an advantage to a specific taxpayer or class taxpayers.[10] While it is clear that the EC can examine EU Member State tax ruling practices for the type of "selectivity" or discrimination that would constitute illegal state aid in contravention of the TFEU,[11] the recent EC decisions exceeded the scope of the EC's authority by questioning the general relevant principles and provisions of Member State law without showing that the challenged practices were selective.

The EC's Decisions have been harshly criticized by multinational firms and regulators but appear to reflect prior criticism that some experts have levied against multinational companies and low-tax jurisdictions.[12] It is probable that the EC's power to review Member State tax laws and tax ruling practices under state aid principles will be decided by the European Court of Justice (ECJ) over the next decade.

The issue is whether the EC has the right to override state sovereignty in order to enforce a global tax governance structure based on the EC's tax sovereignty principles. Under ECJ case law, a finding of state aid requires a finding of selectivity and a finding of advantage.[13] In the rulings at issue, however, the EC has conflated the selectivity and advantage criterion into a single concept of selective advantage, thereby minimizing the selectivity requirement despite the fact that selectivity is an important part of state aid jurisprudence.[14] Basically, the EC is

violating state sovereignty by creating its own interpretation of tax sovereignty in order to enforce its own brand of global tax governance.

This article theorizes that the EC's enforcement initiative could harm the global economy through the erosion of tax certainty and that the EC's retroactive application of the EC's interpretive tax sovereignty principle is not supported by ECJ law. The EC's version of tax sovereignty will likely exacerbate the very harms that the state aid rules were implemented to prevent. Instead of creating a structure of global tax governance, the EC appears to be creating a global chaos of tax uncertainty by overriding state sovereignty.

II. EVALUATING GLOBAL TAX GOVERNANCE

The international economy raises important questions about the structure of global tax governance systems intended to protect markets where globalization implies the erosion of national boundaries.[15] In this respect, it can be argued that the power to implement national regulations within those boundaries declines because people can easily leave their jurisdictions and because the flows of capital are too large and sudden for any one regulator to control.[16]

In contrast, the liberal globalist response to the concern about the erosion of state regulatory power is to build a larger global apparatus, such as the United Nations or EC systems constituted by a legally binding treaty, with expanding governance powers.[17] With the globalization of tax transactions and increasing interdependence among nation-states, there is a growing conflict between the conventional notion of state sovereignty and the flow of tax activity, which disrupts

coherence of the state. In the meantime, the various agencies and institutions within the state, such as independent central banks, develop a high degree of independence reflecting the fragmentation or desegregation of the nation-state.[18]

When it came to tax issues, Westphalian sovereignty at one time was largely respected. The basic rule of Westphalian sovereignty is non-intervention in the internal affairs of other states, guaranteeing the autonomy of the national political authorities over a nation-state's territory.[19] Non-intervention is closely linked to the idea of self-determination, which many felt was necessary to the growth and development of a nation-state.[20] In recent decades, Westphalian sovereignty has been undermined due to the increasing mobility of the tax base, especially capital. Regulatory changes such as the discontinuation of capital controls in one nation-state can affect not only the economies of the surrounding nation-states but even the nation-states in other parts of the world. Economic agents can now move their various forms of capital between nations and shop for the lowest tax burden and this led to calls for more global tax governance.[21]

Global governance establishes rules dealing with issues that each nation already regulates within its territorial boundaries such as crime, pollution, securities fraud and tax evasion. In contrast, traditional international law requires nation-states to implement the international obligations they incur through their own domestic law[22]. Transgovernmentalism supporters claim that the enforcement of domestic law has been made more difficult due to globalization propelled by the information revolution.[23] The transgovernmentalist view stresses that regulators potentially reap the benefits from coordinating their enforcement efforts with those of their foreign peers and from ensuring that other nation-states adopt similar approaches.[24]

Transgovernmentalists likewise argue that the domestic order fragmentation of the nation-state is essential to the development of the global regulatory governance system. They claim that the global governance of the economy requires the globalization of state agencies as long as these agencies maintain a high degree of autonomy and independence. To transgovernmentalists, the transformation of state sovereignty represents the regulatory harmonization through "the nationalization of international law."[25] Transgovernmentalists highlight that each nation-state will be better able to enforce its domestic law by implementing the agreement if foreign peers do likewise in accordance with regulatory agreements that are pledges of self-enforcing good faith.[26]

In 2009, a U.S. federal court in Florida ruled that the Swiss bank UBS had to provide client information for up to 52,000 U.S. citizens to the U.S. Internal Revenue Service (IRS). Before this case was finally settled, a Swiss government official stated that "the court would be substituting its own authority for that of the competent Swiss authorities, and therefore would violate Swiss sovereignty and international law."[27] It seems that nations are now expected to shift fiscal competencies up the ladder of governance and is incompatible with the notion of state sovereignty. Shifting fiscal competencies in such a way endows supra-national institutions, such as the EC, with the power to govern nations based on their own principles, which may run counter to the principles of the sovereign nations.[28]

III. IRELAND AND THE EU

With regard to the EC vs. Apple and Ireland case, the argument can be made that Ireland decided to enter into an agreement with Apple based on Irish values and needs. To the

Irish, employment opportunities may be more important than massive taxes. If the Irish feel that the only way to lure a large, global company such as Apple to its borders is by reducing the tax burden the global company has to pay, why does the EC have the ethical duty to override the Irish belief regarding taxes? Does the EC provide job opportunities to the local Irish citizens? If the answer is no, then who is the EC to decide what Irish agreements should be upheld and what Irish agreements should be overruled?

In the U.S., there is a Federal tax code that is applicable to all U.S. citizens and residents regardless of where they reside.[29] The IRS is responsible for enforcing and collecting Federal taxes.[30] Each state in the U.S. has its own tax code in addition to the Federal tax code. State taxes are only applicable to the residents of that particular state and there is no uniformed collection agency for state taxes.[31] When there is a conflict between Federal tax and State tax, the Federal tax code prevails under the supremacy clause of the US Constitution.[32]

While the U.S. operates under federalism, the EU does not. Although the EU founders wanted federalism, years of negotiations ultimately resulted in the rejection of such a system.[33] As a result, the EU does not impose a tax on EU citizens and each EU citizen is taxed in her/his respective member state.[34]

After a failed attempt to establish an EU Constitution,[35] the Treaty of Lisbon was pushed forward to incorporate many of the EU Constitutional principles.[36] All of the EU member states agreed to ratify the treaty through their respective legislatures, except for Ireland. Due to concerns over the loss of Irish sovereignty, two-thirds of the Irish public voted against the Treaty of Lisbon.[37] Since the incorporation of a treaty into EU law requires the unanimous agreement of all the member states,

the Treaty of Lisbon was not ratified and failed to become part of EU law; therefore, the EU was forced to make specific concessions to Ireland to encourage a "yes" vote in a second referendum.[38]

The major concession made to Ireland was regarding its tax law. In exchange for a "yes" vote, Ireland and the other European leaders agreed to a special protocol,[39] specific only to Ireland and having no effect on the other EU member states.[40] Ireland was provided several guarantees including competence over its own tax laws. After receiving this protocol from the EU, the Irish public voted two-thirds in favor to ratify the Treaty of Lisbon.[41] While the EU still lacks competence over the tax codes of the member states, it participates in the Organization for Economic Cooperation and Development (OECD).[42]

IV. THE OECD

The OECD provides tax policies and guidelines that have facilitated the elimination of harmful tax laws.[43] Over thirty nations, including several EU members, participate in the OECD and contribute to the development of policies and practices for greater economic cooperation. The release of the OECD's Model Convention with Respect to Taxes on Income and on Capital (OECD Model) facilitated the growth of bilateral tax agreements – from less than one-hundred prior to its release, to over 3,000 and many nations rely on it for treaty text.[44]

One of the OECD's most astute contributions to global tax has been its transfer pricing guidelines. Transfer pricing is the process multinational corporations use to assign values to goods and services that involve global transactions between related corporations. The OECD's 1979 Transfer Pricing and

Multinational Enterprises Report (OECD Report) created the arm's length principle, which provides that transactions between related corporations "should not be treated differently for tax purposes from similar transactions between independent parties solely by virtue of the fact that the enterprises are associated."[45] Although the OECD Report was officially repealed in 1995, the arm's length principle remained the standard in evaluating transfer pricing agreements.

Following the 2008 global crisis, the OECD issued the 2010 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines). The OECD Guidelines reaffirmed the arm's length principle as the appropriate standard for evaluating transfer pricing.[46] Many OECD member nations formally adopted the OECD Guidelines into their national laws even though the were not required to do so.[47]

As many nations continued to face fiscal crises after 2008, the OECD identified Base Erosion and Profit Shifting (BEPS) as a problem and created the BEPS Project to address the mismatches in tax rules that allow a corporation to pay low tax or no tax on its profits. The BEPS Project held its first meeting in 2016 and more than eighty nations participated including Ireland and the US. While the BEPS Project strives to reduce global tax avoidance, many multinational corporations take advantage of the differences between nations' tax systems, including Apple, which utilized the difference between the US and Irish tax systems.[48]

V. U.S. VS. IRELAND TAX LAW

The difference between U.S. corporate tax law and Irish corporate tax law creates a tax haven for multinational corporations. Under the U.S. incorporation system, a corporation is subject to U.S. tax only when it is incorporated in the U.S. Under the Irish incorporation system, a corporation is subject to Irish tax only when it resides in Ireland.[49] As an example, suppose DEF Corp. is incorporated in New York, which subjects it to the U.S. corporate tax rate of 35 percent. Now suppose DEF Corp. is also incorporated in Ireland. The fact that DEF Corp. is incorporated in Ireland does not automatically subject it to the Irish corporate tax of 12.5%; in order for DEF Corp. to be subjected to the Irish tax, it would need to meet the Irish residency requirements.

The Irish tax residence definition differs from the global tax residence definition. Under the global tax law, residence is decided by the taxpayer's physical and economic state presence.[50] Ireland does not define tax residence in its tax code and instead adopted the United Kingdom's judicially-created residency test.[51] In De Beers Consolidated Mines Ltd. Vs Howe, De Beers was incorporated in South Africa where it operated diamond mines but maintained an office in the United Kingdom where nine of De Beers' sixteen board members were located. The court found that a corporation is a resident where its central management and control were located and concluded that De Beers was a resident of the United Kingdom.[52]

Now suppose DEF Corp. is incorporated in Ireland with its central management and control is based in its New York office. Under Irish tax law, the fact that DEF Corp.'s central management and control is in New York means that DEF Corp. could avoid paying the Irish corporate tax of 12.5 percent. The difference between the Irish and global tax systems helped

Ireland attract some of the largest multinational corporations in the world, including Apple.

Apple's tax loophole in Ireland was codified by applying the OECD Model as well as the 1997 US Tax Convention with Ireland. Since Apple's subsidiaries were incorporated in Ireland, none of them were subject to U.S. corporate tax. Furthermore, since the central management and control of Apple's subsidiaries were located in Apple's headquarters in the US, the subsidiaries were not subject to Irish corporate tax.[53] Basically, Apple legitimized its tax-free structure through the OECD Model and a bilateral tax treaty between the US and Ireland.

Another tax arrangement between Apple and Ireland involved one of Apple's subsidiaries, Apple Sales International (ASI). In 1991, Apple created the Irish subsidiary of ASI, which recorded all of Apple's profits in Europe, Africa, the Middle East and India. If someone bought a phone in Spain for example, the sale would be recorded by ASI in Ireland, not in Spain. ASI then paid the annual Irish tax rates that were in the range of .005 percent and 1 percent until 2014, according to the profit-sharing agreement between Ireland and Apple. Ireland had one of the lowest corporate tax rates in the EU – 12.5 percent – while most of the other EU member states had corporate tax rates of over 16 percent with the Belgium tax rate rising as high as 33.9 percent.[54]

Although Apple was one of the top technology companies during the 1980s, the stiff competition from Microsoft and Windows during the 1990s caused Apple to restructure pricing allocation among its Irish subsidiaries.[55] In 1991, Apple received a ruling from the Irish government which allowed Apple to allocate 65% of its operating expenses to its subsidiary, Apple Operations Europe (AOE), for revenue up to $60 - $70 million and 20% of operating expenses for any excess revenue. In 2007, Apple received another ruling that approved

Apple's reduced operating expenses allocation of 10-20% and it inclusion of a 1% to 9% Intellectual Property return to its AOE subsidiary. The 1991 Irish government ruling stated that all revenue attributed to ASI would be taxed at 12.5% and the 2007 Irish government ruling allocated 8% to 18% of operating costs to ASI. These rulings caught the attention of the US government.[56]

In 2013, the Permanent Subcommittee on Investigations of the U.S. Senate Committee on Homeland Security and Governmental Affairs (Subcommittee) started to investigate Apple's off-shore profit sharing arrangements. Apple denied the use of illegal tax schemes and suggested that US corporate tax law be updated in light of the new digital age. While the Subcommittee eventually found that current US laws did not prohibit Apple's tax structure in Ireland, the investigation caught the attention of the EC.[57]

VI. THE EC VS. APPLE

In 2014, the EC opened an investigation to determine if the 1991 and 1997 Irish tax rulings granted to Apple constituted state aid in violation of the TFEU.[58] According to the EU, state aid is illegal when a Member State provides a company a selective advantage that distorts or attempts to distort competition. All EU member states are required to receive EC approval prior to granting state aid. If an EU member state grants state aid that violates the TFEU, then the EC must recover the illegal state aid from the recipient.[59]

In the U.S., there is no equivalent for EU state aid; in fact, the U.S. has a different policy regarding corporate subsidies. US corporations enjoy subsidies in the form of grants,

loans and/or tax breaks from both the federal and state governments.[60] Federal government grants and tax credits often total billions of dollars, while federal loans and bailouts exceed trillions. Unlike the EU, the U.S. had not adopted strict guidelines on the use of government subsidies to corporations.[61]

The EU scrutinizes corporate subsidies that the US commonly provides, such as agriculture, energy and transportation.[62] State aid rules are difficult for U.S. multinationals to navigate, especially since they come from a nation that provides corporations generous tax credits.[63] This may explain why the EC's decision was unchartered territory for Apple.

In reviewing the Irish tax rulings, the EC found that Apple received illegal state aid in violation of the TFEU. According to the EC, the tax rulings allowed Apple to engage in transfer pricing that did not reflect the economic realities of the transactions. This allowed Apple to allocate millions in profits to specific Apple subsidiaries in Ireland that were not subject to taxes in any nation.

In deciding that Apple's transfer pricing was not proper, the EC relied on the 2010 OECD Report Guidelines. The EC found that Apple did not provide the proper documentation supporting its transfer pricing tax proposal to the Office of the Revenue Commissioners as required by Section V of the OECD Report Guidelines. Furthermore, the EC found that one of Apple's subsidiaries in Ireland had no real activities demonstrating the lack of economic justification for the transfer pricing allocation.

It was apparent to the EC that Apple received state aid from Ireland. The Irish tax rulings were selective because they were directed solely towards Apple. These rulings also provided

Apple with an advantage in the EU since it paid significantly lower taxes, allowing it to allocate more money to advancing its global operations. This tax avoidance allowed Apple to receive a substantial benefit compared to other businesses, which distorted competition in the internal market.

VII. THE VIOLATION OF STATE SOVEREIGNTY AND DISCRIMINATION

As stated earlier, the EU granted concessions to Ireland in exchange for Ireland voting "yes" to accepting the Treaty of Lisbon. One of these concessions was allowing Ireland to retain competence over its own tax laws.[64] This means that Ireland shouldn't need to obtain approval from the EC in order to grant state aid to Apple or any other company. It seems that the EU is ignoring the protocol it granted to Ireland in exchange for its vote. If the EU can ignore the agreements it creates with member nations, it means that the EU can violate the sovereignty of those nations.

Again, the EU does not practice federalism as the US does. Federalism was attempted by the EU but rejected by the member states. The EU does not impose taxes EU citizens and each EU citizen is taxed in her/his own member state.[65] So, since the EU does not have the power to tax EU citizens, the EU shouldn't be imposing a retrospective tax on Apple for doing business in Ireland.

Apple's tax arrangement in Ireland did not constitute state aid within the meaning of the TFEU since it failed to meet the "selective advantage" requirement.[66] Just as Apple did, Irish corporations could have avoided paying the Irish corporate tax by incorporating in Ireland and establishing management and

control in another country; this arrangement was not limited to Apple. Furthermore, even if the Irish tax rulings did meet the "selective advantage" requirement, they can't be deemed to distort or attempt to distort competition since there is no unified EU tax system. Since there is no unified EU tax sovereignty, the EU is once again violating the state sovereignty of Ireland.

Many US government officials have condemned the EC's decision against Apple. The US Treasury Department announced that it believed the EU was reaching into US corporations in order to take US tax revenue.[67] Other sources have examined the EC's investigations into US corporation tax structures in EU member nations as discriminatory litigation. While many recognize the longstanding concept of state aid, they find that pursuing civil investigations primarily against US companies under a new interpretation of state aid creates disturbing global tax policy precedents.[68] Many also feel that imposing a giant tax bill on company years after the fact sends the wrong message to global job creators.[69]

Indicative of the EC's discriminatory practices against US firms are the recent investigations into Google and Amazon.[70] Google was investigated by the EC for alleged antitrust and data privacy violations and is now being investigated for violating the tax policies of France, Spain and the United Kingdom. In 2016, Google's offices in France and Spain were raided by the EC as part of the investigation. Amazon is being investigated for the alleged violation of state aid in Luxembourg.[71]

The EC's investigations into US corporations has prompted US retaliation against the EU. The US Treasury and the IRS issued Notice 2016-52 addressing proposed regulations for foreign tax credits used to offset US tax obligations. The US is concerned that US corporations will now be able to offset

current US tax obligations to a greater extent since the EC is assessing tax years that are more than two years prior to the current tax year. If the EC continues to target US corporations and assess back taxes on the basis of illegal state aid, the US will have major tax revenue losses stemming from foreign tax credits.[72]

To avoid the major foreign tax credit loss, the US Treasury and the IRS are reducing foreign tax credits. The reduction of foreign tax credits could in turn reduce foreign investment since US corporations may be faced with the possibility of paying double taxation on certain foreign earnings. Since both the EU and the US can't really afford reductions in their respective economies, the ECJ should reject the EC's decision against Apple in order to discourage the EC's discriminatory practice against US corporations.

VIII. CONCLUSION

The EC's recent actions regarding US multinational corporations raises important questions about the structure of global tax governance systems intended to protect markets where globalization implies the erosion of national boundaries. With the globalization of tax transactions and increasing interdependence among nations, there is a growing conflict between the traditional notion of state sovereignty and tax sovereignty, which disrupts coherence of the state.

The EU member-states rejected the notion of the EU serving in a federal capacity; therefore, the EU does not impose a tax on EU citizens and each EU citizen is taxed in his or her respective member state. Furthermore, the EU does not negotiate member state tax treaties or implement member state tax policies

for each member state -- that is left to each of the member states to decide as sovereign nations. Yet, the EC is now imposing retrospective taxes on US multinational companies as if the EC is a federal EU tax sovereignty. Since the EU does not have the right to override state sovereignty and impose its own discriminatory judgments against multinational companies, the Member States should challenge the authority of the EU.

It seems as if sovereign nations must now shift their fiscal competencies up the ladder of governance and this is a violation of state sovereignty. But if the EC can override a sovereign nation's tax policy, then it will cause confusion among corporations as to what tax law should be followed. Apple can enter into a tax agreement with the Irish government but not with the EC so the EC should not be allowed to erode the integrity of the Irish government.

The EC's example of retrospective taxation sends a wrong signal to the global business community since any tax breaks awarded by a sovereign member nation could be reversed by the EC. The entire investment made by a company could be forfeited just because the EC deems a tax arrangement to be unfair. These cases do not set a good precedent and may discourage companies from investing in EU nations if there are better alternatives in other parts of the world. Accordingly, the ECJ should respect state sovereignty and reject discriminatory practices; therefore, the ECJ should reject the EC's case against Apple.

[1] A. Beesley and A. Barker, *Apple Tax Deal: How It Worked and What the EU Ruling Means,* FINANCIAL TIMES (2018).
[2] A. Simon-Lewis, *Apple Takes on the European Commission Over €13 Billion Tax Charge,* WIRED (2017). Retrieved from http://www.wired.co.uk/article/apple-takes-on-the-european-commission-over-13bn-tax-charge (August 2018).
[3] Kyle Richard, *Apple and Ireland v. Commission: What Will the Scope of the European Commission's State Aid Assessments be in the Tax Ruling Context,* TAXATION NEWS 2 (2017).
[4] EC Press Release Database: *Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine* (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm.
[5] EC Decision 2017/502 of 21 October 2015 on State Aid SA.38374 implemented by the Netherlands to Starbucks, 2017 O.J. (L 83) 38. Both Starbucks and the Netherlands have appealed this EC Decision to the European General Court.
[6] EC Decision 2017/1283 of 30 August 2016 on State Aid SA.38373 implemented by Ireland to Apple, 2017 O.J. (L 187) 1. Both Apple and Ireland have appealed this EC Decision to the European General Court.
[7] State Aid – Luxembourg, 2015 O.J. (C 44) 2. (The EC at this point has only issued an opening decision in the Amazon case).
[8] EC Decision 2016/1699 of 11 January 2016 on the excess profit exemption State Aid scheme SA.37667 implemented by Belgium, 2016 O.J. (L 260) 61. Belgium has appealed this EC Decision to the European General Court.
[9] *See* Fiat Decision, *supra note 4*, at para. 346; Starbucks Decision, *supra note 5*, at para. 360; Apple Decision, *supra note 6*, at para. 321.

[10] *See* Fiat Decision, *supra note 4*, at para. 346; Starbucks Decision, *supra note 5*, at para. 360; Apple Decision, *supra note 6*, at para. 321.
[11] *See* Belgium Decision, *supra note 8*, at para. 118.
[12] Denovio, *State Aid: What It Is and How It May Affect Multinationals and Tax Departments*, TAX EXECUTIVE (2016).
[13] *See*, e.g., Joined Cases C-182/03 & C-217/03, Belgium and Forum 187 ABSL v. Comm'n, 2006 E.C.R. I*5613-15; Joined Cases C-78/08 to C-80/08, Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. Paint Graphos Soc. Coop. arl and Others, ECLI:EU:C:2011:550, paras. 48-49.
[14] Fiat Decision, *supra note 4* at para. 190.
[15] David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 UTAH LAW REVIEW. 545, 548, N.4 (1997).
[16] Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS, No. 5 (Sep./Oct. 1997) at 183.
[17] Michael Zuern, *From Independence to Globalization*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 235 (Walter Carlsnaes et al., eds. 2000). The liberal globalization requires a centralized rule-making authority and universal membership.
[18] Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 GLOBAL LEGAL STUDIES JOURNAL 425, 426 (1999) (arguing that the idea of one unified internal system of sovereignty has become increasingly problematic in a global economy surrounded by islands of sovereignty rather than by a single, centralized authority.
[19] *Id.*
[20] Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, CORNELL INTERNATIONAL LAW JOURNAL 30 (2007): 653-59.
[21] Thomas Rixen, From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of

International Tax Governance, REVIEW OF INTERNATIONAL POLITICAL ECONOMY 18, No. 2 (2010): 197-227.
[22] Slaughter, *supra note 16.*
[23] *Id.*
[24] *Id.* at 191.
[25] *Id.*
[26] *Id.*
[27] *See* Peter Dietsch, CATCHING CAPITAL: THE ETHICS OF TAX COMPETITION (2015).
[28] *Id.*
[29] Frequently Asked Questions About International Individual Tax Matters, IRS, https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-about-international-individual-tax-matters (last updated May 2, 2018).
[30] The Agency, its Mission and Statutory Authority, IRS, https://www.irs.gov/about-irs/the agency-its-mission-and-statutory-authority (last updated May 26, 2018).
[31] *See* TAX POLICY CENTER'S BRIEFING BOOK: STATE (AND LOCAL) TAXES, Tax Pol'y Ctr. (2016).
[32] U.S. Const. art. IV, § 2, *see* also Bank v. Supervisors, 74 U.S. 26, 26-27 (1868).
[33] Nigel Foster, FOSTER ON EU LAW 80-81 (5th ed. 2015).
[34] *Id.* at 80-81.
[35] Andrea, Broughton, *European Council Fails to Agree on Constitutional Treaty*, Eurofound (December 16, 2003), http://www.eurofound.europa.eu.ez-proxy.brooklyn.cuny.edu:2048/observatories/eurwork/articles/european-council-fails-to-agree-on-constitutional-treaty.
[36] *See* Henry McDonald, Irish Voters Reject EU Treaty, THE GUARDIAN (June 13, 2008), https://www.theguardian.com/world/2008/jun/13/ireland.
[37] See Cathal M. Brugha, *Why Ireland Rejected the Lisbon Treaty, in Rejecting the EU Constitution: From the*

Constitutional Treaty to the Treaty of Lisbon 127 (Anca M. Pusca ed., 2009).
[38] Simon Taylor, *Irish Secure Concessions on Lisbon Treaty,* POLITICO, (December 11, 2008), http://www.politico.edu/article/irish-secure-concessions-on-lisbon-treaty/.
[39] *Protocol on the Concerns of the Irish People on the Treaty of Lisbon,* 2018 O.J. (L60) 132, 132-33.
[40] *Id.*
[41] Ian Traynor, *Promises Made to Irish on Lisbon Treaty to Become EU Law,* THE GUARDIAN (June 19, 2009), https://www.theguardian.com/world/2009/jun/19/lisbon-treaty-Ireland-eu-law.
[42] Edi Hadzhieva, Policy Dep't Econ. & Sci. Policy, EU Parliament, *The European Union's Role in International Economic for a Paper 3: The OECD* 14, 42 (Karine Gaufillet ed., 2015).
[43] Traynor, *supra note 40*.
[44] OECD, Model Convention with Respect to Taxes on Income and on Capital Condensed Version 9 (OECD Publishing 2014).
[45] David W. Williams, EC Tax Law 82-84 (1998).
[46] OECD, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2 (OECD Publishing 2010).
[47] *Id.*
[48] OECD, OECD/G20 Base Erosion and Profit Shifting Project Explanatory Statement: 2015 Final Reports 4-5 (OECD Publishing 2015).
[49] Taxes Consolidation Act 1997 (Act No. 39/1997) (Ir.), http://www.irishstatutebook.ie/eli/1997/act/39/enacted/en/pdf.
[50] Williams, *supra note 44* at 16.
[51] W.J. Tipping v. Louis Jeancard (1947) 2 ITC 360 (H. Ct.) 365 (Ir.).
[52] De Beers Consolidated Mines Ltd. V. Howe (1905) 2 KB 612 (AC) 612 (UK).

[53] Tax Convention with Ireland, Ir.-US, Art. Iv, July 28, 1997, S. Treaty Doc. No. 105-31.
[54] M. Bennedsen and M. Stabile, *The Implications of the EU vs. Apple Case*,
INSEAD (March 10, 2017) Retrieved from https://knowledge.insead.edu/economics-finance/the-implications-of-the-eu-vs-apple-case-5481.
[55] Offshore Profit Shifting and the U.S. Tax Code – Part 2 (Apple Inc.) Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs U.S. Senate, 113th Congress 3 (2013) (Statement of Sen. Carl Levin, Chairman of the Permanent Subcommittee).
[56] EC Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016 O.J. (C 262) 36.
[57] *Supra note 54.*
[58] *See* EU Panel Says Apple Gets Illegal Tax Benefits in Ireland, NBC NEWS (September 30, 2014) http://www.nbcnews.com/business/taxes/eu-panel-says-apple-gets-illegal-tax-benefits-ireland-n215281.
[59] Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998 O.J. (C 384) 3, 3.
[60] *See* Tom Cahill, *10 Taxpayer Handouts to the Super Rich That Will Make Your Blood Boil*, US UNCUT (October 28, 2015), http://usuncut.com/class-war/10-corporate-welfare-programs-that will-make-yourblood-boil; Nikaj Chokshi, *The United States of Subsidies: The Biggest Corporate Winners in Each State*, THE WASHINGTON POST (March 18, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/17/the-united-states-of-subsidies-the-biggest-corporate-winners-in-each-state.
[61] Phillip Mattera and Kasia Tarczynska, *Uncle Sam's Favorite Corporations: Identifying the Large Companies that Dominate*

Federal Subsidies, GOOD JOBS FIRST 2, 8 (2015), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/UncleSamsFavoriteCorporations.pdf.
[62] *See* European Commission on State Aid – France, Restructuring Aid to Areva SA 44727, 2016 O.J. (C 301) 2, 3; European Commission on State Aid – Austria, Klagenfurt Airport – Ryanair and Other Airlines Using the Airport S.A.24221, 2012 O.J. (C 233).
[63] 26 U.S.C. § 45 (2012 and Supp. III 2015).
[64] Brugha, *supra note 36.*
[65] Foster, *supra note 32.*
[66] TFEU, Article 121, October 26, 2012, 2012 O.J. (C 326) 172.
[67] Ali Breland, *Chamber Official: EU 'Targeting' US Companies,* THE HILL (September 1, 2016), http://thehill.com/policy/technology/294125-chamber-official-eu-targeting-us-companies.
[68] John Engler, *EU Has Gone Too Far Targeting US Companies,* CNBC (February 24, 2016), http://www.cnbc.com/2016/02/24/eu-has-gone-too-far-targeting-us-companies-commentary.html.
[69] Naomi Jagoda Ryan, EU's $14.5B Tax Ruling Against Apple 'Awful', THE HILL (August 30, 2016), http://thehill.com/policy/finance/293829-ryan-eu-tax-ruling-against-apple-awful.
[70] EC Press Release IP/14/1734, *Antitrust: Commission Fines Google 2.42 Bilion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison-Shopping Service* (June 27, 2017), http://europa.eu-ez-proxy.brooklyn.cuny.edu:2048/rapid/press-release IP-17-1734 en.pdf.
[71] Kelly Couturier, *How Europe is Going After Apple, Google and Other U.S. Tech Giants,* N.Y. TIMES (December 20, 2016), http://www.nytimes.com/ez-

proxy.brooklyn.cuny.edu:2048/interactive/2015/04/13/technology/how-europe-is-going-after-us-tech-giants.html?r=0

[72] Internal Revenue Service, Notice 2016-21 Foreign Tax Credit Guidance Under Section 909 Related to Foreign-Initiated Adjustments (2016).

BUILDING LONG-TERM STRATEGIC VALUE BY ADDRESSING BARRIERS TO FUTURE-ORIENTED LEGAL THINKING

by

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The business environment will present diverse challenges for organizations over the next 10 years. Organizations will face growing litigation and regulatory complexity across a broad range of legal areas, including consumer protection, employee retaliation, intellectual property, and cybersecurity.[1] Organizations that embrace a future-oriented, proactive law perspective will stand poised to outperform their rivals through managing risk and cultivating value in an increasingly uncertain legal environment.[2] The generation of strategic value from a future-oriented, proactive approach to law requires integration between legal strategy and business strategy within the organization.[3] Unreceptive managerial viewpoints toward the strategic value of law constitute a primary factor hindering such integration. To address this encumbrance to integration, a growing need exists for techniques that will alter unreceptive managerial viewpoints toward the law.[4]

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The development of techniques for addressing unreceptive managerial viewpoints toward the law is an emerging area of scholarship. Legal researchers have developed an assortment of innovative frameworks that serve this purpose, including the manager's legal plan, the five pathways of legal strategy, concept-sensitive managerial analysis, legal astuteness, and the systems approach to law, business, and society.[5] Despite the increased growth of scholarship, however, scholars have largely failed to address methods for implementing proactive approaches within the organization. The existing literature in this area, largely dominated by an optimistic belief that proactive law frameworks are capable of easy implementation within the organization, fails to encompass the reality that efforts to enact organizational change routinely fail due to a lack of employee buy-in.[6] Interpersonal conflict between managers and lawyers, driven by differences in decision-making, behavior and other factors, is customary within the organization and represents a barrier to promoting proactive, future-oriented legal thinking.[7] As the proactive law approach invokes drastic changes to managerial viewpoints toward the strategic value of law,[8] any legal training efforts must also include measures to resolve the organizational conflict between managers and lawyers.

Managerial employees come to legal training programs with unique attitudinal viewpoints stemming from dissimilar goals, opinions, biases, expectations, and preconceived notions about the value they will derive from the training sessions. As participants' attitudinal viewpoints toward training affect the overall effectiveness of training programs,[9] any training initiatives must incorporate measures designed to promote training receptivity among participants.[10] The reduction of anxieties relative to participation in the training process represents a critical measure for enhancing training receptivity

among managerial participants.[11] A critical aspect of promoting training receptivity among participants involves building relationships between the trainers and the trainees. Trust is central to the cultivation of relationships between trainers and trainees within the learning environment.[12] As managerial participants may come to legal training with feelings of mistrust toward legal trainers, it is critical to address the question: How to build relationships and promote trust between company managers and in-house counsel? The purpose of this article is to identify team building, reflection, and other rapport building exercises organizations may use to support training programs designed to encourage managerial embrace of proactive, future-oriented legal thinking.

BENEFITS OF A PROACTIVE APPROACH TO LAW

Changes in the modern business environment have driven the need for new perspectives on the benefits of legal strategy to business success. Due to growing hypercompetition in the business environment, increases to litigation, growing complexity in legal regulation, globalization, and other factors, there is a greater need for integrating legal strategy with organizational efforts to obtain competitive advantage.[13] Organizations that adapt to the systemic, substantive, and enforcement flexibilities within all legal systems will stand in a better position to outperform their rivals.[14] Law affects each of the activities in the value chain (warranties, sales, manufacturing, distribution, design), as well as each of the forces that delineate enterprise attractiveness in the eyes of customers (buyer power, supplier power, threat of rivals, threat of new entrants, substitute availability).[15] Proactive law encompasses a growing area of scholarship focused on developing new perspectives on the connections between the value chain, enterprise attractiveness, and legal strategy.

A unique set of future-oriented operating principles and characteristics drive the application of proactive law. Proactive law encompasses the use of law as an empowering mechanism to foster relationships, cultivate value, and manage future risk.[16] The principles of proactive law center on two core areas: (a) skills, knowledge, and practices that promote the identification of prospective legal problems in sufficient time to take preventive action; and (b) the identification of business opportunities in sufficient time to exploit conceivable benefits.[17] Proactive law principles have also supported in-house legal departments in transitioning from reactive legal departments to proactive legal departments.[18] Reactive legal departments habitually function in crisis/firefighter mode by reacting to events as they occur, dramatically reducing their capacities to systemically identify future business risks.[19] Proactive legal departments, by contrast, promote behaviors and procedures necessary for more expedient responses to emerging business issues.[20] Proactive law moves beyond legal problem prevention considerations to supporting organizational competitive strategy through the integration of future-oriented, proactive law principles into the company's guiding policies and action plans.[21]

Proactive law, by encouraging managers to embrace proactive perceptions toward law and legal strategy, provides a foundation for organizations to reframe legal problems as business opportunities and to develop new options for value creation.[22] In the area of product liability, for example, a proactive view toward legal strategy supports the generation of new product ideas and customer value.[23] Organizations may draw critical information relative to new product or service opportunities for themselves, or their industries, through the information provided by customer complaints, warranty claims, and lawsuits.[24] A proactive commitment to sustainable development in response to increased environmental regulation

may lead to cost reductions and increased revenue through the redesign of an organization's processes, products, or business models.[25] A proactive approach to contracting supports organizational efforts to fuse project management, risk prevention, relationship management, and value creation into daily business practices.[26]

The proactive law approach represents a change from traditional organizational viewpoints toward the strategic value of law and legal strategy. Managers routinely view the law and the legal department as constraints on organizational growth.[27] Depending on the level to which proactive law advocates seek to integrate proactive law principles with organizational processes and practices, the level of proposed change within the organization may range from minor to substantial. Attempts to enact change within an organization routinely fail as a result of anxieties and tensions that hinder employee support and adoption of the organizational change.[28] If proactive law proponents are to succeed in integrating proactive law principles with organizational processes and practices, they must take the factors that will support and hinder such success into account.

ORGANIZATIONAL LEARNING

Organizational learning is critical to the integration of proactive law principles with organizational processes and practices. We adopt the definition of organizational learning provided by Schilling and Kluge, who defined it as, "an organizationally regulated collective learning process in which individual and group-based learning experiences concerning the improvement of organizational performance and/or goals are transferred into organizational routines, processes and structures, which in turn affect the future learning activities of the organization's members."[29] Organizational learning

encompasses four distinct processes: (1) intuiting – an individual develops new insights and ideas based on personal experiences; (2) interpreting – the individual explains his or her new insights and ideas to others and groups; (3) integrating – the others and groups develop a shared understanding of the new insights and ideas, providing the foundation for collective action; and (4) institutionalizing – application of the shared understanding to organizational rules, procedures, strategies, and systems leads to guiding the actions of all organizational members.[30] Given that in-house counsels' efforts to promote the application of proactive law principles within the organization center on explaining the benefits of proactive law to managerial employees, we focus on the interpreting process for the purposes of this article.

A breakdown in the interpreting process will inhibit efforts by in-house counsel to encourage the application of proactive law principles among managerial employees. Three types of barriers hinder each of the four processes to organizational learning: (a) actional-personal barriers, structural-organizational barriers, and societal-environmental barriers.[31] We focus on the actional-personal barriers to organizational learning for the purposes of this article, as the substantial majority of barriers to the interpreting process fall under this category. Numerous concerns relative to interpersonal relationships consume the list of actional-personal barriers to the interpretation process:[32]

- Conflict in relationships between innovator and group
- Lack of motivation or anxiety by group members
- Deficiency of political or social skills by innovator
- Perceived lack of advantage over existing practices
- Low trustworthiness of innovator

As discussed more fully below, actional-personal barriers to the interpreting process parallel many of the factors driving organizational conflict between managers and in-house counsel. Organizations seeking to realize competitive advantage through embracing a proactive law perspective must address this conflict.

ORGANIZATIONAL CONFLICT

Organizational conflict is inevitable for any company. Rahim described conflict as an interactive process manifested in disagreement or incompatibility within or between social entities.[33] Conflict arises in a diverse array of situations, including instances where: (a) a person must perform an activity that is not linked to his/her needs; (b) a person desires or needs access to a limited resource; (c) behavioral preferences of one person are opposed to the behavioral preferences of another person; or (d) other people do not share the skills, attitudes, values, or goals that direct another person's behavior.[34] It is critical that organizations acknowledge the presence of conflict in the workplace and take active steps to address such conflict, especially in situations where the conflict derives from differences in work habits, personality conflicts, or observations of performance.[35]

There is an expectation of interpersonal conflict between managers and in-house counsel. The existing literature contains extensive scholarship reflecting managerial perceptions of apathy and condescension toward law, the regulatory system, and the legal profession. Managers often view legal regulations as restrictions on permissible activities, impairments to organizational growth, and an inevitable cost of doing business.[36] Managerial views of the legal system have, in turn, driven managerial views of in-house counsel.

Managerial perspectives of in-house counsel contain views that attorneys have excessive and unjustified authority over decisions affecting the employer-employee relationship, including promotions/demotions, benefits access, and terminations.[37] Other common opinions of in-house counsel include beliefs that lawyers are inept at formulating imaginative solutions to complex problems, are not team players, and are a necessary evil within the business environment.[38] Travis and Tranter argued that such perceptions stem from a cultural mistrust and a lack of regard for the legal professions.[39] Exaggerated, fictional depictions of attorneys as aggressive *fighters* in popular culture have cultivated impracticable expectations of attorneys in practice.[40] Given the numerous perspectives toward attorneys and the legal system at large, it is necessary to examine the forces driving such viewpoints in the organizational context.

Deviations in education, training, and behavior between managers and lawyers embody three of the major forces driving managerial opinions toward attorneys in the corporate setting. Individuals without a legal background often display decision-making and behavioral patterns that are significantly dissimilar from individuals with a legal background.[41] For instance, while managers are commonly associated with the willingness to take risks, tendencies toward risk aversion often characterize members of the legal profession.[42] Perceptions of risk adversity among lawyers affect perceptions of lawyers' abilities to work in teams, as they reinforce the beliefs that company lawyers are not team players.[43] Scholars have also examined the role of discipline-specific language in hindering effective collaboration by in-house counsel in a team setting. The inability (or unwillingness) to apprehend legalese may lead managers to ignore relevant, critical legal information in the decision-making context.[44] Aggravation stemming from an excessive use of legalese may result in the further exclusion of

lawyers from organizational teams through the exacerbation of cultural differences.[45]

Organizational conflict, regardless of the individuals or groups involved, cannot be ignored. Evading dialogue on conflict may lead to significant damage for the firm, as conflicts regularly grow absent direct action as opposed to dissolving on their own.[46] Confronting conflict head-on, in contrast, enables an organization to benefit from constructive conflict. Constructive conflict involves the discussion of opposing viewpoints to challenge conventional reasoning and viewpoints, detect potential threats and opportunities, and craft innovative solutions that lead to success in the marketplace.[47] The direct discussion of opposing viewpoints challenges employees to evaluate and reconsider their initial positions, supports inquisitiveness, stimulates the exchange of questions, and cultivates understanding of contrasting positions.[48] Constructive conflict enables groups comprised of diverse members to produce superior results in the decision-making process.

The connections between organizational conflict and organizational learning present a unique opportunity in the context of efforts to integrate proactive law principles with organizational processes and practices. Addressing the actional-personal barriers to organizational learning will lead to improved interpersonal relationships between managers and in-house counsel. Improved relationships between managers and in-house counsel will lead to more open-minded discussion between the two groups. Open-mindedness in the organizational context occurs when employees come together to understand each other's positions, objectively consider the reasoning for each other's positions, and attempt to assimilate their collective positions into mutually agreeable solutions.[49] Growth in open-minded discussion between managers and in-

house counsel will, in turn, provide an environment supportive of training initiatives designed to promote managerial support and adoption of proactive law.

SUPPORTING TRAINING THROUGH RELATIONSHIP BUILDING

The development of a corporate environment supportive of proactive law training initiatives cannot occur without a fundamental examination of how participants approach training programs. Training represents the acquisition of knowledge, skills, and abilities that support organizational goals and objectives.[50] Effective training programs nurture employee readiness in ways that serve the mission, goals, and bottom lines for organizations.[51] The continuous development of employee knowledge and skills represents a critical element of firm performance and competitiveness.[52] The design of effective training programs must accompany a holistic understanding of the diverse forces that influence training effectiveness, including an examination of the processes that must occur before training sessions are delivered to employees.[53]

Employees approach corporate training programs in a variety of ways. Participants come to training programs with unique attitudinal viewpoints stemming from dissimilar goals, opinions, biases, expectations, and preconceived notions about the value they will derive from the training sessions.[54] Participants' attitudes toward training program affect their respective approaches toward the program, which then affect the training program's overall effectiveness.[55] As noted above, managerial attitudes toward legal training may reflect feelings of apathy, condescension, repression, mistrust, and misunderstanding.[56] It is therefore necessary for the training experience to incorporate measures designed to promote

training receptivity among participants, even before their exposure to course training materials.[57] The reduction of anxieties relative to participation in the training process represents a critical measure for enhancing training receptivity among managerial participants.[58]

One important aspect of promoting training receptivity among managerial participants in legal training centers on building relationships between the trainers and the trainees. As suggested by Peterson, several techniques exist for improving relationships between managers and in-house counsel: building rapport through socialization, understanding the concerns/focus/perspectives of the other, and viewing each other as valued partners.[59] Trust is central to cultivating relationships within the learning environment. The trainers can enhance trainees' achievement of the desired learned objectives by creating a learning environment that fosters trust between the trainers and the trainees.[60] As managerial participants may come to legal training with feelings of mistrust toward legal trainers, who will likely be members of the organization's legal department, it is critical to address the question: How to build relationships and promote trust between company managers and in-house counsel?

The exercises below represent just a few of the many, low-cost approaches to build relationships and promote trust between company managers and in-house counsel:

- **Marshmallow Challenge:** In the Marshmallow Challenges groups compete to build the tallest freestanding structure to support a marshmallow using limited materials while observing a set of pre-defined challenge rules. Although the materials may vary from challenge to challenge, the typical 'Marshmallow Challenge Kit' includes 20 sticks of uncooked

spaghetti, one marshmallow, one yard of string, and one yard of tape. The TED Talk video by Tom Wujec provides an excellent overview of the challenge and breakdown of it's the benefits.[61]

- **World Café Technique:** The World Café Technique provides a means for participants to start developing trusting relationships by supporting connection through conversations.[62] The technique is based on the observation that people naturally share ideas, connect with each other, and create fresh observations when in a relaxed, café type setting.[63] The small group atmosphere that routinely characterizes the café environment enables individuals to limit their exposure to embarrassment, shyness, and other factors that may inhibit the free sharing of conversation and ideas.[64]
- **Cell Phone Ringtone Discussion:** The Cell Phone Ringtone discussion is a simple icebreaker activity where participants introduce themselves by playing their cell phone ringtones for the entire group. This exercise is a useful tool to help participants start conversing and connect in a way that is not too personal or intrusive.[65]
- **"I AM:"** The "I AM" activity empowers participants to get to know each other beyond a work-related context and to learn how other people perceive themselves. Participants write "I am . . ." at the top of a piece of paper or index card followed by five endings to the statement that represent themselves. Participants affix the papers or cards to their shirts and spend several minutes reading each other's statements. Once participants have had a chance to read the statements on each other's cards, they can then branch out into discussions on the statements they found interesting. Additional versions of "I am . . ." may include "I fear. . . .," "I hope. . .," or "I am not . . ."[66]

- **Cartoon Characters Exercise:** The Cartoon Characters exercise is designed to expand participants' self-awareness, to support a better understanding of their fellow participants, and to promote creativity and reduce stress through the use of humor.[67] For this exercise each participant selects a cartoon character with a personality trait that he or she identifies with and explains that choice to the other participants. It's important to illustrate to the participants that since cartoon characters exaggerate traits that people share, the exercise is a valuable tool for gaining perspective on themselves and those around them.

Regardless of the selected activity, it is important to remember that facilitating a team-building activity successfully involves a series of steps:[68]

- Step 1 – **Select relevant activity**. Begin with the objective in mind and consider whether and how the activity will support trust building.
- Step 2 – **Prepare for activity**. Obtain needed materials, set up the room, and practice facilitator's comments and actions.
- Step 3 – **Explain activity to participants**. Welcome participants with enthusiasm, explain the activity, and clarify the reasoning and benefits behind the activity.
- Step 4 – **Clarify activity**. Ensure participants understand the rules and check for questions or misunderstandings.
- Step 5 – **Conduct activity**. Encourage participants during the activity, ensure compliance with the rules, and clarify misunderstandings as needed.
- Step 6 – **Debrief participants immediately following activity**. Ask questions to help participants use what

they learned from the activity in their jobs going forward.

CONCLUSION

Interpersonal conflict between managers and in-house counsel, a customary occurrence within organizations driven by differences in decision-making, behavior and other factors, represents a barrier to promoting proactive, future-oriented legal thinking. As the proactive approach to law may require drastic changes to managerial viewpoints toward the strategic value of law, legal training efforts must include measures to resolve the organizational conflict between managers and in-house counsel. Managerial employees come to legal training programs with unique attitudinal viewpoints stemming from dissimilar goals, opinions, biases, expectations, and preconceived notions about the value they will derive from the training sessions. As participants' attitudinal viewpoints toward training affect the overall effectiveness of training programs, any training initiatives must incorporate measures designed to promote training receptivity among participants. The reduction of anxieties relative to participation in the training process represents a critical measure for enhancing training receptivity among managerial participants. A critical aspect of promoting training receptivity among participants involves building relationships between the trainers and the trainees. Team building, reflection, and other rapport building exercises will support the cultivation of relationships between legal trainers and managerial trainees within the learning environment, and in turn, support the managerial embrace of proactive, future-oriented legal thinking.

[1] DLA Piper, *Top 10 Litigation, Risk Management, and Compliance Trends for 2016* (2016), https://m.acc.com/chapters/chic/upload/RNS-Powerpoint-Presentation-ACC.pdf (cybersecurity); Elena Holodny, *The 'Fourth Industrial Revolution' Will be Great for Lawyers*, BUS. INSIDER (Mar. 2016), http://www.businessinsider.com/fourth-industrial-revolution-great-for-lawyers-2016-3 (intellectual property); John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1895 (2016) (employee retaliation).

[2] Gerlinde Berger-Walliser, Paul Shrivastava, & Adam Sulkowski, Using Proactive Legal Strategies for Corporate Environmental Sustainability, 6 MICH. J. ENVTL. & ADMIN. L. 1, 3 (2016).

[3] Yi-Min Chen, Yu-Ting Ni, Hsin-Hsien Liu, & Ying-Maw Teng, *Information-and Rivalry-Based Perspectives on Reactive Patent Litigation Strategy*, 68(4) J. BUS. RESEARCH, 788, 788 (2015).

[4] Gerlinde Berger-Walliser, *The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement*, (University of Connecticut, School of Business Research Paper), https://www.research gate.net/profile/Gerlinde_Berger-Walliser/publication/273440662_The_Past_and_Future_of_Pro active_ Law_An_Overview_of_the_Proactive_ Law_Movement/; Steven L. Lovett, *The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of In-House Counsel*, 34 J. L. & COMM. 113 (2015).

[5] Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81, 81 (2014) (5 pathways of legal strategy); GEORGE J. SIEDEL & HELENA HAAPIO, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2016) (Manager's Legal Plan); Constance E. Bagley, *Winning Legally: The Value of Legal*

Astuteness, 33 ACAD. MGMT. REV. 378 (2008) (legal astuteness); Constance E. Bagley, *What's Law Got to Do With It? Integrating Law and Strategy*, 47 AM. BUS. L. J. 587, 592 (2010) (systems approach to law, business, and society). James E. Holloway, *Concept-Sensitive Managerial Analysis with Law: Applying a Business Concept to a Legal Rule to Identify the Domain of Business Situations*, 6 WM. & MARY BUS. L. REV. 137 (2015).

[6] MATS ALVESSON & STEFAN SVENINGSSON, CHANGING ORGANIZATIONAL CULTURE: CULTURAL CHANGE WORK IN PROGRESS (2015); Lisa C. Barton & Veronique Ambrosini, *The Moderating Effect of Organizational Change Cynicism on Middle Manager Strategy Commitment*, 24 INT'L J. HUMAN RESOURCE MGMT. 721, 721 (2013).

[7] Ben W. Lewis et al., *Difference in Degrees: CEO Characteristics and Firm Environmental Disclosure*, 35 STRAT. MGMT. J. 712 (2014) (individuals with a legal background can display patterns of behavior and decision-making markedly different from individuals without a legal background); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3053 (2014) (tendencies toward risk aversion often characterize members of the legal profession but not managers and executives); Stephen Betts & William Healy, *Having a Ball Catching on to Teamwork: An Experiential Learning Approach to Teaching the Phases of Group Development*, 19 ACAD. EDUC. LEADERSHIP J. 1, 1 (2015) (emphasis placed on teamwork in business education); Nancy J. Knauer, *Learning Communities: A New Model for Legal Education*, 7 ELON L. REV. 193 (2015 (legal education has traditionally placed more emphasis on competition, individual accomplishment, and self-sufficiency).

[8] Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary*

International Framework, 39 N. C. J. INT'L L. & COMM. REG. 334, 335 (2014).
[9] ROY POLLOCK, ANDY JEFFERSON, & CALHOUN W. WICK, THE SIX DISCIPLINES OF BREAKTHROUGH LEARNING: HOW TO TURN TRAINING AND DEVELOPMENT INTO BUSINESS RESULTS (2015).
[10] *Id.*
[11] Herman Aguinis & Kurt Kraiger, *Benefits of Training and Development for Individuals and Teams, Organizations, and Society*, 60 ANNU. REV. PSYCHOL. 451, 461 (2009).
[12] Lesley Gill et al., *Using World Café to Enhance Relationship-Building for the Purpose of Developing Trust in Emotional Intelligence Training Environments*, 14 ELEC. J. BUS. RESEARCH METHODS 98, 101 (2016).
[13] David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & BUS. 137 (2016); George J. Siedel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law among Business School Core Courses*, 37 AM. BUS. L. J. 717, 732-733 (2000).
[14] Evans & Gabel, supra note 8.
[15] CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY (2015).
[16] Gerlinde Berger-Walliser, *supra* note 4; NORDIC SCHOOL OF PROACTIVE LAW, *Welcome to the Website of the Nordic School of Proactive Law*, http://www.proactivelaw.org/
[17] *Id.*
[18] Susie Lees et al., *Stop Putting out Fires and Start Working Proactively with your Client*, 31 ACC DOCKET 73, 77 (2013).
[19] *Id.*
[20] *Id.*
[21] Siedel & Haapio, *supra* note 5.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

[27] Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N. C. J. INT'L L. & COMM. REG. 334, 335 (2014).
[28] MATS ALVESSON & STEFAN SVENINGSSON, CHANGING ORGANIZATIONAL CULTURE: CULTURAL CHANGE WORK IN PROGRESS (2015); Lisa C. Barton & Veronique Ambrosini, *The Moderating Effect of Organizational Change Cynicism on Middle Manager Strategy Commitment*, 24 INT'L J. HUMAN RESOURCE MGMT. 721, 721 (2013).
[29] Jan Schilling & Annette Kluge, *Barriers to Organizational Learning: An Integration of Theory and Research*, 11 INT'L J. OF MGMT. REV. 337, 338 (2009) (dual nature of learning encompasses processes (perceiving and processing information, i.e. experience) and results (modified knowledge or skill).
[30] Mary M. Crossan et al., *An Organizational Learning Framework: From Intuition to Institution*, 24 ACAD. MGMT. REV. 522, 523 (1999).
[31] Schilling & Kluge, *supra* note 29.
[32] *Id.*
[33] Afzalur M. Rahim, *Toward a Theory of Managing Organizational Conflict*, 13(3) INT'L J. CONFLICT MGMT. 206, 206 (2002).
[34] *Id.*
[35] Geoffrey VanderPal & Victor Ko, *An Overview of Global Leadership: Ethics, Values, Cultural Diversity and Conflicts*, 11 J. LEADERSHIP, ACCOUNTABILITY & ETH. 166 (2014).
[36] George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, AM. BUS. L.J. 641 (2010); Richard S. Gruner, *Lean Law Compliance: Confronting and Overcoming Legal Uncertainty in Business Enterprises and Other Complex Organizations*, 11 N.Y. J. L. & BUS. 247, 252 (2014) (cost of doing business).
[37] Lovett, *supra* note 4, at 131.

[38] Chuck Barry & Kristin Kunz, *In-House Counsel should Implement Servant Leadership to Help Clients make Values-Based Decisions*, 37 HAMLINE L. REV. 501, 519 (2014); Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC. REV. 457, 468 (2000).
[39] Mitchell Travis & Kieran Tranter, *Interrogating Absence: The Lawyer in Science Fiction*, 1 INT'L J. L. PROF. 23, 27 (2014).
[40] Helena Haapio, *Business Success and Problem Prevention through Proactive Contracting: A Proactive Approach*, 49 SCAND. STUD. L. 149 (2015).
[41] Ben W. Lewis et al., *Difference in Degrees: CEO Characteristics and Firm Environmental Disclosure*, 35 STRAT. MGMT. J. 712 (2014).
[42] Evans & Gabel, supra note 8, at 335; John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3053 (2014).
[43] Lees et al., supra note 18.
[44] E. MAXWELL, LEGAL DRAFTING (2013); K. B. C. Ashipu & Gloria M. Umukoro, *A Critique of the Language of Law in Selected Court Cases in Nigeria*, 5 MEDITERRANEAN J. SOC. SCI. 622 (2014).
[45] Haapio, *supra* note 40.
[46] Dean Tjosvold, Alfred S.H. Wong, & Nancy Yi Feng Chen, *Constructively Managing Conflicts in Organizations*, 1 ANNU. REV. ORGAN. PSYCHOL. ORGAN. BEHAV. 545, 546 (2014).
[47] *Id.*
[48] Tjosvold et al., *supra* note 46 at 556.
[49] *Id.*
[50] Raja I. Sabir, et al., *Impact of Training on Productivity of Employees: A Case Study of Electricity Supply Company in Pakistan*, 3 INT'L. REV. MGMT. & BUS. RESEARCH, 595 (2014).

[51] G. S. David Jayakumar & A. Sulthan, *Modelling: Employee Perception on Training and Development*. 11 SCMS J. INDIAN MGMT. 57, 57 (2014).
[52] Moonkyoung Jang et al., *The Impact of E-Training on HR Retention in Midsized Firm*, 23 ACAD. ENTREPRENEURSHIP J. 1, 1 (2017).
[53] Traci Sitzmann & Justin M. Weinhardt, *Training Engagement Theory: A Multilevel Perspective on the Effectiveness of Work-Related Training*, 44 J. MGMT. 1, 2 (2018).
[54] Timothy T. Baldwin et al., *The State of Transfer of Training Research: Moving toward more Consumer-Centric Inquiry*, 28 HUMAN RESOURCE DEVELOPMENT QUARTERLY 17, 17 (2017).
[55] Pollock et al., *supra* note 9.
[56] George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, AM. BUS. L.J. 641 (2010); Lovett, *supra* note 5, at 131; Haapio, *supra* note 40.
[57] Pollock et al., *supra* note 9.
[58] Aguinis & Kraiger, *supra* note 11.
[59] Evan Peterson, Empowering Business Policy & Strategy through Improved Collaboration between Managers and In-House Counsel, 20 ATLANTIC L. J. 225, 242 (2018).
[60] Gill et al., *supra* note 12.
[61] Tom Wujec, *Build a Tower, Build a Team*, https://www.ted.com/talks/tom_wujec_build_a_tower (last visited Oct. 1, 2018).
[62] Juanita Brown, A Resource Guide for the World Café, http://www.meadowlark.co/world_cafe_resource_ guide.pdf, (last visited Oct. 1, 2018).
[63] *Id.*
[64] *Id.*
[65] BRIAN C. MILLER, MORE QUICK TEAM-BUILDING ACTIVITIES FOR BUSY MANAGERS: 50 NEW EXERCISES THAT GET RESULTS IN JUST 15 MINUTES (2007).
[66] *Id.*

[67] ADELE B. LYNN, QUICK EMOTIONAL INTELLIGENCE ACTIVITIES FOR BUSY MANAGERS: 50 TEAM EXERCISES THAT GET RESULTS IN JUST 15 MINUTES (2007).
[68] Miller, *supra* note 65.

A TALE OF TWO DEFENSE ATTORNEYS: USING THE FILMS "JAGGED EDGE" AND "SUSPECT" TO TEACH LESSONS IN ETHICS, GENDER ROLES AND TRIAL PROCEDURE IN A LAW CLASS

by

Sharlene A. McEvoy*

INTRODUCTION

Twenty-first century students are a media-oriented group accustomed to gaining information from sources other than books, magazines, journals, and newspapers. Many college professors therefore attempt to engage student interest by using media to teach important concepts.

One of the most challenging subjects to instruct is law because it has a particular argot that is unfamiliar to those outside of the legal profession. The use of film provides an avenue to engage students in not only learning legal terms but in providing a springboard for classroom discussion.

This paper discusses the use of two films that can aid students in learning a variety of legal and ethical concepts as well as to foster a debate about gender roles in the legal profession: "Jagged Edge"[1] and "Suspect".[2]

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Synopsis of "Jagged Edge"

Recently divorced Teddy Barnes (Glenn Close) is a former prosecutor who now practices at a large San Francisco, California law firm. Driven from her job by a guilty conscience over failing to disclose exculpatory evidence about the innocence of a criminal defendant, Henry Styles, who hanged himself while in prison, she has vowed not to undertake any more criminal cases. John C. "Jack" Forrester (Jeff Bridges) has been accused of murdering his wife Paige, a wealthy newspaper owner and her maid in a particular brutal fashion. Forrester insists that Teddy represent him not only because she is a woman but also because of her stellar reputation as a trial attorney.

Reluctant at first, but prodded by the bosses at her law firm, Teddy agrees and engages a private investigator Sam Ransome, (Robert Loggia) to look into the case. Coincidentally, the prosecutor Tom Krasny (Peter Coyote) was involved in the mishandling of the information and the subsequent cover-up in the Syles case.

Both Teddy and the politically ambitious Krasny square off in the courtroom drama that ultimately leads to Forrester being found "not guilty" despite lingering doubts about whether he is really innocent.

Synopsis of "Suspect"

Kathleen Riley (a surprisingly effective Cher) occupies a legal position at the other end of the spectrum from Teddy Barnes. Kathleen plays a single, overworked public defender in Washington D.C. who is also reluctant to take on a client Carl Wayne Anderson, (Liam Neeson in an early role). Anderson, unlike the wealthy and polished Jack Forrester, is a handicapped homeless veteran who is forced to survive by

breaking into parked cars to find a warm place to sleep.

Unlike Teddy Barnes who has an investigator to help her unearth information to support her case, Cher has very little help in her effort to exonerate her client, who stubbornly refuses to communicate with her until she learns that he is unable to speak or hear and can only explain what has happened in writing.

Kathleen seeks to obtain a continuance in the case so she can take a much needed vacation. She wants more time to find more information about how Elizabeth Rose Quinn, a government employee from the Justice Department, was murdered and why a potential witness had his throat cut. She gets no sympathy from Judge Matthew Helms (John Mahoney) or prosecutor Charlie Stella (Joe Montegna).

Like Jack Forrester, Carl Wayne Anderson's trial ends with his being freed but the result has nothing to do with Kathleen's courtroom skills.

ETHICAL ISSUES

Both films were produced in the 1980s at a time when women were just beginning to enter the legal profession in large numbers. However, both lawyers display ethical lapses that raise serious questions about their professional judgment. Teddy Barnes embarks on a sexual relationship with her client during the trial, despite the fact that the Rules of Professional Conduct for lawyers proscribe such conduct.[3] Trial testimony reveals that Forrester had also had a sexual relationship with his wife's friend, under circumstances similar to those with Teddy. Horseback riding was said to be his method of seduction.

While Kathleen Riley is not in love with Carl Anderson, she becomes involved with one of the jurors; a lobbyist for the dairy industry, Eddie Sanger (Dennis Quaid)

who is not above seducing a member of Congress to get a favorable vote on a bill. Sanger repeatedly gives covert help to Kathleen during the trial through anonymous telephone calls and not-so-chance meetings. Kathleen should have reported this activity to the judge so that a mistrial could have been declared, but she does nothing even though the judge has glimpsed her in Sanger's company and has threatened to charge her with professional misconduct.

Students can be asked to evaluate each lawyer's conduct. Should they have withdrawn from representing their clients? Was the well-being of the defendants compromised by their behavior? By becoming involved romantically with Jack Forrester did not Teddy become more invested in getting him exonerated? Similarly, Kathleen was trying to do her best under difficult circumstance to free her client. Wasn't Sanger just trying to be helpful by suggesting that Kathleen determine whether Anderson was left or right handed, finding the key to the file cabinet, and the cuff link? Was it not her job to free her client even if the means to do so was questionable? She did not solicit Sanger's help and tried to discourage him by telling him to leave her alone.

CONTACT WITH THE JUDGE

During the trial as Teddy begins doubt Forrester's innocence, she meets with Judge Clark Kerrigan (John Dehner) to discuss withdrawing from the case.

She had told Forrester that she would take the case on one condition: that she would drop out if she found out that he was guilty. When Teddy is shaken by testimony from Eileen Avery that she and Forrester had a six month affair, she vows to drop the case.

Teddy poses a hypothetical to the judge who admonishes her about her ethical obligation to her client but says if a lawyer wants to drop out of a case, a judge would

have to accede to the attorney's wishes

According to the Rules of Professional Conduct, "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation". Teddy had a duty to consult the judge to determine if he would entertain her request to step down from the case. At this point in the trial the judge would have to consider if Forrester's right to a fair trial would be prejudiced by allowing Teddy to drop out.[4]

Kathleen Riley seeks out Judge Helms not to inform him of juror Sanger's improper conduct[5] as she had told Sanger she should do and get him thrown off the jury.
Instead Kathleen goes to Judge Helms' house and says that she has evidence that she believes will exonerate her client. She then abruptly changes her mind and says she will introduce the evidence in court. Judge Helms charges that her behavior is erratic and borders on professional misconduct.

By visiting the judge's house did Kathleen violate a rule of professional conduct that states:

> "A lawyer shall not communicate ex parte with (a judge) during the proceeding unless authorized to do so by law or court order"[6]

Certainly the prosecutor, Charlie Stella should have been involved in any meeting with the defense attorney and the judge.

Judge Helms had long been suspicious that Riley had been in contact with a juror. He noticed Sanger near her car shortly after the trial began and later spotted them in the law library.

The judge summoned her to his chambers and asked, "Have you had contact with a juror on this trial? Kathleen replied, "No", lying to the judge.

He says "If I find any evidence of collusion, I will have you disbarred and charged with jury tampering."

Should Kathleen have admitted that she had spoken to Sanger and then have asked to be removed from the case?

Kathleen told Sanger that she would do anything to help her client because she was "his only chance". Was it a breach of ethics to lie or did she have her client's best interests in mind?

The Rules of Professional Conduct require that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal (read judge) or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[7]

COURTROOM STRATEGY

Teddy Barnes makes a brief opening statement "John C. Forrester did not kill his wife or her maid. He is an innocent man, unjustly accused." Was this an effective opening gambit?

Students should pay attention to the cross examination of Virginia Howell and Anthony Fabrizi and the nature of the objections raised.

Fabrizi claims that he saw a hunting knife with a jagged edge in Forrester's locker Number 122 but another witness, Duane Bendix claims to have had such a knife in his locker: 222.

Students should note how persistent Teddy is in asking Anthony Fabrizi if it is not possible that the knife he identified with a jagged edge was not in Jack Forrester's locker but in the locker with a similar number? Eventually Fabrizi, flustered by the persistent questioning, admits that it is possible that it was

not Forrester's knife, significantly undermining the prosecution's case.

The students should also note Teddy's instructions to Forrester about his pre-trial behavior, namely that he not be seen in public having a good time that he be viewed as a grieving widower. She also instructs him to wear a blue suit and to help her carry her briefcase into court as part of the positive impression to be left on the jury.

The instructor should note that Krasny's team had a woman attorney and Teddy worked with a younger man.

In "Suspect", Carl Wayne Anderson's appearance at the arraignment as a shaggy haired, bearded man with unkept clothing is a far cry from the person who appears at trial. He wears a brown suit and tie. His hair is cut short and he has no beard. Students should be asked about whether had he appeared at trial in his original condition, a jury have been more likely to convict him.

The instructor should also call the class's attention to the fact that in "Suspect", the title of the case is United States v. Carl Wayne Anderson because the crime occurred in Washington D.C. where murder charge is tried in federal court.

USING THE MOVIES IN CLASS

The instructor can end the film when the jury's verdict is announced in People v. John C. Forrester since the focus of the class is on legal procedure.

The instructor might ask students to consider the comment Teddy Barnes makes to Forrester when he asks her:

> How can you continue to defend me if you think I'm guilty?
>
> Teddy replies: "It happens all the time. It's the

legal system."

The students should be asked if the legal process should be a search for truth as opposed to just about getting a client exonerated.

Students should also consider whether prosecutor Krasny behaved unethically when he did not disclose to the defense that Julie Jensen had suffered a fate similar to Paige Forrester eighteen months earlier. Teddy had found out about Jensen due to an anonymous tip but Krasny admitted in the presence of the judge in chambers that he had pulled the police report. Students should be asked to consider if Krasny's pattern of unethical behavior first, in withholding information in the Styles case, and second in Forrester's case, should be a reason for him to resign as prosecutor and face additional punishment. Krasny's conduct clearly violates the ethical canon that;

> A lawyer shall not:
>
> 1. Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.[8]

When Krasny was Barnes' supervisor in the district attorney's office, she went along with the scheme to conceal the evidence that would have exonerated Henry Styles.

The instructor should point out that Krasny's surprise witness Eileen Avery was not on the witness list. When Teddy protested in a sidebar with the judge and Krasny, she complained that this was the kind of stunt she had warned about in chambers.

Krasny claimed that Avery had agreed to testify only at the last minute as a result of a subpoena which he produced to the court. Teddy was unprepared for Avery's bombshell testimony and did not cross-examine her.

Students should be asked if this was the turning point of the case or did that come later when Sam Ransome uncovered additional information implicating tennis pro Bobby Slade.

The instructor should remind students that Teddy first had faith that Forrester was innocent then believed that he was guilty, and then believed that he was not. They should be asked what information Teddy had at each point.

Students should analyze Teddy's cross-examination of Bobby Slade. Did she goad him into calling her the name that appeared written in blood on the headboard of the victims? Did his menacing conduct in the parking garage cement his place as the prime suspect in the murders?

Kathleen Riley faces far different challenging in representing her client. Since Carl Anderson is deaf and dumb, she can only communicate with him by asking him questions by writing on the blackboard.

When she asks her boss, Morty for investigative help he says that he will scrounge up some money, then asks if this potential witness, Michael John Guthridge, is a figment of her client's imagination.

When Guthridge cannot be found, Kathleen asks Judge Helms for a continuance which he denies. Do the students think that the judge should have granted the delay?

She pleads with the judge that she cannot present an effective defense without the witness. The judge debunks her argument questioning whether Michael could be found and if he were, whether his testimony would have any value.

Judge Helms is unsympathetic to all of Kathleen's pleas during the trial. Students should be asked to view the movie

and carefully evaluate the respective demeanors of Clark Karrigan and Mathew Helms.

The instructor should ask students to examine how many objections were sustained and overruled and which side – prosecution or defense had the edge. Did Judge Karrigan rule more even-handedly than Judge Helms?

Ask the students to count the objections sustained and overruled by Judge Helms as well as other comments he made. Do the students detect an animus toward Kathleen and her client? Do the students think that Helm's attitude was based on discrimination because Kathleen was a woman?

Unlike "Jagged Edge", "Suspect" partially depicts the voir dire or jury selection process. Students should be asked about the questions Kathleen Riley poses to the bank loan officer and how his responses prompted Riley to use one of her peremptory challenges. Why would she want the bank employee dismissed as a juror? Students should also be asked about Sanger's response to the prosecutor's question about capital punishment and the judge's curious instruction to the jury about the death penalty.

While both movies offer only fleeting shots of the juries, students should be asked to look closely at the make-up of both panels to determine, how many men and woman and how many minorities were involved.

In "Suspect", the judge ordered the jury sequestered stating that he believed that counsel had had contact with the jurors. Was it done too late in the trial to affect the jury's verdict?

Students should consider carefully the opening statements. Who was the more effective? Prosecutor Stella gives a brief portrait of Elizabeth Rose Quinn, the victim, and describes her murder in graphic terms and how the only thing

stolen was nine dollars.

Kathleen focused on personal qualities of Carl Anderson, how he was a veteran who fought for his country and fell on hard times after suffering from meningitis. Students should be asked which opening statement influenced them the most.

Riley says Carl Wayne Anderson was not a hardworking citizen. "He is the American nightmare". Was it fair to cite his service in Vietnam? She says nine dollars, in Carl Anderson's world, is the difference between eating and starving to death? Was defense counsel using the right approach by preempting the prosecution's criticism of the defendant?

Students should look carefully at the direct and cross-examination of the doctor who examined the victim's fatal throat wound. Did Kathleen effectively undermine the witness's direct testimony? Judge Helms criticized her cross-examination for being weak. Do the students agree with that assessment?

Should Kathleen Riley have permitted her client to testify since he was forced to use a computer to respond to questions? His taking the stand focused the jury's attention on the fact that his handcuffs had to be removed which would have told them that he must have become disruptive when they were out of the courtroom.

Students should be asked to consider if Carl Anderson did not testify would the jury have regarded him less favorably as unwilling to tell his story to them. Did his testimony help or hurt his case? Did the prosecutor's cutting cross-examination score points in portraying Anderson as violent? In the wake of his testimony, would the students vote "guilty" or "not guilty"? How do students view the fact that Jack Forrester did not testify at his trial?

CONCLUSION

The most effective use of the movie "Suspect" is to stop the showing at the point the jurors are sequestered. The students should base their assessment of the case as presented up to that point. The students should be asked to decide the case. If the class votes "guilty" ask what part of the prosecutor's case swayed the group to that decision. If "not guilty" ask if that verdict was based on the opening statements and examination of witnesses.

Students should be asked to evaluate Kathleen Riley's effectiveness as a defense attorney – What did she do right and what went wrong?

In "Jagged Edge", the instructor should stop the film at the point where Teddy and Jack Forrester are waiting for the jury to reach its verdict. How do the students evaluate the case? Which side presented the stronger evidence? If the students were jurors, would they vote "guilty" or "not guilty" and why?

In neither case, should the class be shown the entire movie. The students should focus on the legal issues and the quality of the representation given to both defendants.

Finally, the students should be asked: Who is the better defense counsel? Teddy Barnes or Kathleen Riley?

If the students were accused of a crime, which lawyer would they want standing beside them? Or maybe the students would decide that they would rather be represented by a lawyer who more closely follows the rules of professional conduct.

[1] Columbia Pictures 1985. Directed by Richard Marquand. 108 minutes

[2] Tri Star Pictures 1989. Directed by Peter Yates.

[3] See for example Conn Rules of Professional Conduct, Rule 1.8(j) Conflict of Interest: Prohibited Transactions, Jan 1, 2007 http://www.aw.cornell.edu/ethics/ct/code/CT_CODE.HTM#Rule_4.1

[4] Id. See for eg 1.16(c) Declining or Terminating Representation.

[5] Id. See Conn Rules of Professional Conduct Rule 3.3(e) Condor Toward the Tribunal:

"When prior to judgement, a lawyer becomes aware of discussion or conduct by

a juror which violates the trial court's instructions to the jury, the lawyer shall

promptly report that discussion or conduct to the trial judge."

[6] Id. See Rule 3.5(2) Impartiality and Decorum.

[7] Id. See Rule 3.3(l) Candor Toward Tribunal.

[8] Id. See for eg Rule 3.4(1) Fairness to Opposing Party and Counsel.