

# DUQUESNE LAW REVIEW



## BEHIND THE CLASSROOM: AN EXAMINATION OF LAW SCHOOLS IN THE 21<sup>ST</sup> CENTURY

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EXCHANGES, AND CONTRACTS IN THE AMERICAN LAW SCHOOL

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*Alyssa L. Lazar*



# Duquesne Law Review

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# Foreword

*Brandon Stump*

This issue of the *Duquesne Law Review* provides readers with multiple opportunities to reconsider facets of legal academia many have probably considered static, immutable, or “just the way things are.” I have a background in critical race theory and civil rights law. I earned a J.D., practiced law, and then returned to school to earn an M.F.A. in creative writing. I am autistic, and despite my various challenges coping with change,<sup>1</sup> I find myself constantly at the epicenter of personal and professional alterations (see brief recitation of professional endeavors above), evolutions, and changes.<sup>2</sup> For these reasons, I find myself to be an expert on what changes are good versus those that are bad. Altering my morning routine or daily plans? Bad. Creating a more inclusive and thoughtful future? Good. The articles presented herein represent the most potent form of academic thought: The deceptively subversive presentation of facts and argumentation that require the reader to reconsider one of America’s most traditional institutions: law school.

All of the professional articles in this issue revolve around legal academia. On a macro level, Prof. Noah Kupferberg’s *Democracy Begins at Home: Agreements, Exchanges, and Contracts in the American Law School* presents a contractual approach to evaluating the various relationships between the various parties involved in legal education. Prof. DeShun Harris’s *Office Hours Are Not Obsolete: Fostering Learning through One-on-One Student Meetings* focuses on one specific relationship—that between professor and student—and she specifically calls for professors who write-off office hours as a mere formality to reconsider the educational value of the one-on-one time with students. Additionally, Prof. Diana J. Simon’s *Cross-Cultural Differences in Plagiarism: Fact or Fiction?* asks readers to consider the evidence regarding the way that one’s cultural background influences one’s concept of plagiarism. And in my own article, *Allowing Autistic Academics the Freedom to Be Autistic*:

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1. *Obsessions, Repetitive Behaviour and Routines*, NAT’L AUTISTIC SOC’Y (Oct. 11, 2016), <https://www.autism.org.uk/about/behaviour/obsessions-repetitive-routines.aspx>.

2. THE YOUNG RASCALS, *How Can I Be Sure?*, on GROOVIN’ (Atlantic Records 1967) (singing the universally appropriate lyric, “[h]ow can I be sure in a world that’s constantly changing?”).

*The ADA and A Neurodiverse Future in Pennsylvania and Beyond*, I argue that autistic academics, like myself, should be protected from adverse employment action even though our disability commonly manifests in behavioral, personality, and social interactions that would be unprotected and unaccommodated, even under traditional notions of employment law. Each professional author is calling for some form of change to how we exist in, process, or evaluate some facet of law school—an academy in the midst of great change, itself.

As of 2014, 26 percent of students entering law school were students of color, a five percent increase over a decade.<sup>3</sup> The ABA's statistics from 2018 reveal that this enrollment trend continues: Of the 38,390 law students enrolled in the last year, 11,981 were minority students.<sup>4</sup> In other words, nearly thirty-one percent of all new law students are minority students.<sup>5</sup> While the ABA does not track information regarding disability and law student enrollment, we do know that approximately eight percent of master's students and seven percent of doctoral students have some form of disability.<sup>6</sup> Furthermore, law schools around the country are diversifying in other ways. In attempts to fill seats emptied by the massive decline in enrollment, some law schools are reaching out to foreign students interested in studying American law in a law school classroom. Currently, nearly 14 percent of all law school enrollees across the country are pursuing non-J.D. programs.<sup>7</sup> Law schools are also attracting foreign students with LLM programs which allow foreign students to specialize in tax or entertainment law.

The academy is changing by finally admitting those students historically denied seats in schools—particularly people of color. If we as attorneys and academics teaching the law are to truly seek a

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3. Kelly McEvers, *As Law School Applicant Pool Shrinks, Student Bodies Diversify*, NPR (Apr. 26, 2016, 4:28 PM), <https://www.npr.org/2016/04/26/475773282/nations-top-law-schools-face-near-record-enrollment-decline>; Aaron N. Taylor, *As Law Schools Struggle, Diversity Offers Opportunities*, CHRON. HIGHER EDUC. (Feb. 10, 2014), <https://www.chronicle.com/article/As-Law-Schools-Struggle/144631>.

4. *Statistics*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/) (last visited Jan. 23, 2019) (follow “2018 1L Enrollment by Gender & Race/Ethnicity” hyperlink).

5. *See id.*

6. Council of Graduate Schools, *Data Sources: Graduate Students with Disabilities*, 44 COMMUNICATOR 1, 4 (July 2011), [https://cgsnet.org/ckfinder/userfiles/files/comm\\_2011\\_07.pdf](https://cgsnet.org/ckfinder/userfiles/files/comm_2011_07.pdf) (explaining that disability includes “blindness/visual impairment, physical/orthopedic disability, deafness/hard of hearing, learning/cognitive disability, vocal/speech disability, and other/unspecified disabilities”).

7. Sara Randazzo, *Law Schools Find a Way to Fill Seats (No Lawyers Required)*, WALL ST. J. (Dec. 20, 2018, 12:19 PM), <https://www.wsj.com/articles/law-schools-find-a-way-to-fill-seats-no-lawyers-required-11545301800>.

more just world than the one we inherited, our only hope is to have more representatives from each underrepresented group in a legal classroom, behind a podium, and in administration. Once we have lawyers from underrepresented groups, the future of the academy is poised to become naturally and fully integrated. All of these changes require that the legal academy consider the arguments and research contained herein in order to equitably and fairly meet the demands of changing landscape. This issue, in which I'm proud to be featured, is a step toward a fair and thoughtful future for law professors, law students, and in turn, our world.

Democracy Begins at Home:  
Agreements, Exchanges, and Contracts in the  
American Law School

Noah Kupferberg\*

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## III. CONCLUSION..... 40

The educational enterprise of the American law school operates by way of broad agreements between the parties in interest. Such agreements, no matter their precise form, may be categorized by the identity of the participants, as agreements: (1) between governing bodies like the American Bar Association (“ABA”) and the law school; (2) between the law school and its professors; (3) between the law school and its students; and (4) between the professors and their students.

The agreements between these parties take many different forms. Some are handed down from above and some are negotiated; some are signed and some are not; some are written and some are pledged orally. These agreements create different relationships between the parties based in part on their origins and forms.

Of all such agreements, the democratic ideal is best represented by the contract. The private law created by a contract “is democratic because a traditional contract must be the agreement of both parties.”<sup>1</sup> The parties to a contract “objectively manifest their mutual intent to be bound to a specific relationship,”<sup>2</sup> and such mutual consent is “central to the democratic character of traditional contracts.”<sup>3</sup> Because the traditional contract binds only the makers of that agreement, “contractual law embodies the democratic ideal of government by and with the consent of all the governed.”<sup>4</sup>

In a time of increased anti-democratic sentiment and governance in the United States and abroad, it is surely sensible and wise to examine the underlying democracy (or lack thereof) in our daily relationships. For many of the readers of this article, such daily life is largely conducted at American law schools.

This article will consider each of the numerous agreements that underlie the functioning of the American law school in terms of contract requirements under both the Restatement (Second) of the Law

1. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971); see also HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 311 (1945) (“[T]he contractual creation of law is a democratic procedure.”); F. Eric Fryar, *Common-Law Due Process Rights in the Law of Contracts*, 66 TEX. L. REV. 1021, 1025 (1988) (“Contracts are an extremely democratic form of law.”) (citing E. ALLAN FARNSWORTH, *CONTRACTS* § 1.2, at 6 (1982) (“[T]he terms of such direct bilateral exchanges are arrived at voluntarily . . . Each party to an exchange seeks to maximize his own economic advantage on terms tolerable to the other party.”)).

2. Fryar, *supra* note 1 (citing Wendell H. Holmes, *The Freedom Not to Contract*, 60 TUL. L. REV. 751, 751 (1986)).

3. James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 56 (2003).

4. Fryar, *supra* note 1 (citing Slawson, *supra* note 1).

of Contracts<sup>5</sup> and the leading theories of contract<sup>6</sup> to determine which, if any, of these agreements rise to the level of a genuine democratic contract between the parties in interest.

## I. CONTRACTS

### A. *Contract Requirements*

In order to analyze how agreements in the American law school context measure up to genuine, enforceable, democratic contracts, it is first necessary to briefly remind ourselves of the required elements of contract formation. The law school agreements discussed in Part II will then be analyzed in terms of these requirements to see whether or not they amount to contracts.

Jurisdictions differ with respect to what is necessary to form a contract.<sup>7</sup> However, the classic requirements include the following: (1) offer; (2) acceptance; (3) consideration; and (4) mutuality of intent to contract.<sup>8</sup>

#### 1. *Offer*

The Restatement (Second) of Contracts defines an offer as “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”<sup>9</sup> A “mere expression of intention or general willingness to do something” does not amount to an offer.<sup>10</sup> “An offer must be definite and certain,”<sup>11</sup> although it “may be made by words, acts, or conduct.”<sup>12</sup> An offer “is ordinarily a promise, [and therefore] it will typically look to the future.”<sup>13</sup> Unless a statement made by the offeree “gives the person to whom it

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5. These requirements are Offer, Acceptance, Consideration, and Mutual Intent. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 24, 50, 71 (AM. LAW INST. 1981).

6. The theories to be discussed *infra* include: (1) contract as promise; (2) contract as consent; and (3) contract as economic efficiency.

7. *See* 17A AM. JUR. 2D *Contracts* § 18 (2018) (collecting elements of a valid contract in different jurisdictions).

8. *See, e.g., City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (the formation of a contract requires “(1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance.”) (quoting *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990)).

9. RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981).

10. 17A AM. JUR. 2D *Contracts* § 46 (2018).

11. *Id.*

12. *Id.*

13. 1 WILLISTON ON CONTRACTS § 4:7 (4th ed. 2018).



is addressed an assurance that . . . that person may conclude a bargain, the statement is not an offer.”<sup>14</sup>

## 2. *Acceptance*

Acceptance of an offer is defined as “a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.”<sup>15</sup> Acceptance is required in order to form a contract, and “[t]he effect of acceptance is to convert the offer into a binding contract.”<sup>16</sup> The acceptance of an offer “must be communicated to the offeror; a mere secret intent to accept or assent is not sufficient.”<sup>17</sup> Acceptance of an offer is required to create a contract because “it takes two to make a bargain.”<sup>18</sup>

## 3. *Consideration*

Consideration consists of a bargained-for performance or return promise.<sup>19</sup> Such a “performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>20</sup> A contract cannot exist without sufficient consideration.<sup>21</sup> Such consideration “may be a benefit to the promisor or a detriment to the promisee. It may take the form of a right, interest, or profit accruing to one party, or some forbearance, detriment, or responsibility given, suffered, or undertaken by the other . . . [or the] creation, modification, or destruction of a legal relation.”<sup>22</sup> Consideration is “the exchange or price requested and received by the promisor for its promise.”<sup>23</sup> Consideration “distinguishes a contract from a gift.”<sup>24</sup>

## 4. *Mutual Intent*

Contract formation also requires “a manifestation of mutual assent to the exchange.”<sup>25</sup> This element of mutual intent “is sometimes referred to as a ‘meeting of the minds.’”<sup>26</sup> Such a meeting of

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14. *Id.*

15. RESTATEMENT (SECOND) OF CONTRACTS § 50 (AM. LAW INST. 1981).

16. 17A AM. JUR. 2D *Contracts* § 65 (2018).

17. *Id.* § 68.

18. 2 WILLISTON ON CONTRACTS § 6:1 (4th ed. 2018).

19. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

20. *Id.*

21. 17A AM. JUR. 2D *Contracts* § 101 (2018).

22. *Id.*

23. 3 WILLISTON ON CONTRACTS § 7:2 (4th ed. 2018).

24. 17A AM. JUR. 2D *Contracts* § 101 (2018).

25. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981).

26. *Id.*

the minds must occur “at the same time, on all the essential elements or terms to form a binding contract.”<sup>27</sup> Which terms are essential “depends on the agreement and its context and also on the subsequent conduct of the parties.”<sup>28</sup> It should be further noted that, “although often treated as a distinct element for a contract, a meeting of the minds is a component of both offer and acceptance, measured by what the parties said and did, and not on their subjective state of mind.”<sup>29</sup> Furthermore, “mutual assent to enter a contract is . . . normally manifested by an offer and acceptance.”<sup>30</sup> That is to say, following an offer, “an acceptance of the proposal or offer completes the manifestation of assent.”<sup>31</sup>

### B. *Contract Theory*

To further our understanding of contracts and their underlying principles, it is also helpful to discuss what legal scholars consider to be the historical, commercial, and philosophical underpinnings of contract law. These theories will then be applied to the series of law school agreements considered here to help us understand whether, and in what ways, those agreements amount to contracts.

Contracts are one of the earliest forms of private law, their basic tenets and philosophical underpinnings laid out in Plato’s *Laws*, written in the 4th Century B.C.E.,<sup>32</sup> Roman,<sup>33</sup> Medieval,<sup>34</sup> early Common Law,<sup>35</sup> and Civil Law<sup>36</sup> also incorporated principles and rules of contract law. From the broadest perspective, the law enforces private agreements such as contracts in order to “enable people to rely on them as a rule and thus make the path of enterprise more secure.”<sup>37</sup> Indeed, contract law in its most general formulation can be compared to an overarching infrastructure: “its most important societal role is to supply frameworks for cooperative ac-

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27. 17A AM. JUR. 2D *Contracts* § 29 (2018).

28. *Id.*

29. *Id.* § 31.

30. *Id.*

31. 1 WILLISTON ON CONTRACTS § 4:3 (4th ed. 2018).

32. PLATO, *THE LAWS*, Book XI, § 23, at 460 (Trevor J. Saunders ed., Penguin Classics 1975) (c. 360 B.C.E.).

33. See DIAN TOOLEY-KNOBLETT & DAVID GRUNING, 24 LA. CIV. L. TREATISE, Sales § 1:1 (2017).

34. See James Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield’s Trial Notes*, 76 GEO. L.J. 1949, 1950-58 (1988).

35. See Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35, 36-37 (1983).

36. See Richard R.W. Brooks & Alexander Stremitzer, *Remedies On and Off Contract*, 120 YALE L.J. 690, 695 (2011).

37. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 591 (1933).

tivity. Like the proper functioning of say, a highway, contract depends not only on written rules of the road, but also on the reliability of contextual practices.”<sup>38</sup> Beyond such broad descriptions, modern scholars have offered many theories considering the philosophical underpinnings of contract law.<sup>39</sup> For purposes of this analysis, we will focus on the three most broadly accepted theories (which also happen to be most directly related to the law school contractual relationships that this article describes): (1) Promise; (2) Consent; and (3) Economic Efficiency.

### 1. *Contract as Promise*

The classical promise theory of contract is based on the moral and political principle that individuals have rights, which they are permitted to dispose of as they choose,<sup>40</sup> and the state and the courts are bound to respect the obligations individuals impose upon themselves.<sup>41</sup> Charles Fried, in his important 1981 book *Contract as Promise*, argues that “promise is morally binding because it is the willing invocation by a free moral agent of a convention that allows him to bind his will.”<sup>42</sup> Fried prioritizes the moral argument that “to refuse to recognize, or to interfere with, a person’s free choice is to refuse him the respect of treating him as an autonomous moral agent.”<sup>43</sup> In this, he rejects the contrary scholarly argument that collective and paternalistic judgments about the individual’s best interests may be more accurate than the individual’s own analysis.<sup>44</sup> Instead, Fried sets out the theory that the introduction of such agreements assures one’s ability to use others’ work for one’s own purposes, and that this trust became a “powerful tool for our

38. Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 430 (2004).

39. See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271-91 (1986) (discussing the will, reliance, efficiency, fairness, and bargain theories of contract, and introducing the “consent theory”); Efi Zemach & Omri Ben-Zvi, *Contract Theory and the Limits of Reason*, 52 TULSA L. REV. 167, 179-213 (2017) (addressing and critiquing by means of “legal aesthetics” the promissory, reliance, economic efficiency, and pluralist conceptions of contract).

40. Michigan Law Review Association, *Contract as Promise: A Theory of Contractual Obligation*, by Charles Fried. Cambridge, Mass.: Harvard University Press. 1981. Pp. 162. \$14., 81 MICH. L. REV. 904, 904 (1983).

41. P. S. Atiyan, *Contract as Promise: A Theory of Contractual Obligation*. By Charles Fried. Cambridge, Mass.: Harvard University Press. 1981. Pp. 162. \$14.00, 95 HARV. L. REV. 509, 509 (1981); see also Michigan Law Review Association, *supra* note 40.

42. Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U. L. REV. 961, 972-73 (2012).

43. Atiyan, *supra* note 41, at 523.

44. *Id.* at 523-24.

working our mutual wills in the world.”<sup>45</sup> Promise, under this theory, “is a kind of moral invention: it allows persons to create obligation where there was none before and thus give free individuals a facility for extending their reach by enlisting the reliable collaboration of other free persons.”<sup>46</sup> Promise “implies more than a communication of intention (which we are free to change, though others may be injured); it implies a commitment to a future *course of conduct*.”<sup>47</sup>

## 2. *Contract as Consent*

Randy Barnett’s consent theory of contract begins with the earliest of human interactions, based on the obligatory allocation of scarce natural resources.<sup>48</sup> Under this theory, certain agreements are legally binding because the parties to the transaction bring certain rights and then “manifest their assent to the transfer of these rights.”<sup>49</sup> Contract law thus “concerns enforceable obligations arising from the valid transfer of entitlements that are already vested in someone,”<sup>50</sup> and any legally enforceable obligation that results is based on the parties’ original voluntary consent.<sup>51</sup> Although the consent theory of contract contains some broad parallels to Fried’s promise theory, Barnett notes that a promisor “may have a moral obligation to do what she promised . . . [but] [w]ithout more she would not have a legal obligation . . . .”<sup>52</sup> Only when the promisor

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45. Michigan Law Review Association, *supra* note 40, at 904-05 (quoting CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 8 (Oxford Univ. Press, 2d ed. 2015) (1981)).

46. Fried, *supra* note 42, at 962.

47. Michigan Law Review Association, *supra* note 40, at 905; *but see* Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1175 n.144 (2016) (noting that “the conception of promises as normative and contract as purely remedial . . . seems to motivate Lipshaw . . . who argues that promise and contract are separate because the former concerns obligations and the latter concerns consequences. . . . Lipshaw does not maintain that there could be contracts without promises, but he insists that contract law is not addressed to the moral question of obligation.”) (citing Jeffrey M. Lipshaw, *Duty and Consequence: A Non-conflating Theory of Promise and Contract*, 36 CUMB. L. REV. 321, 327 (2006)).

48. Barnett, *supra* note 39, at 294.

49. *Id.* at 319.

50. *Id.* at 297; *see also id.* at 270 (“Properly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent. Consent is the moral component that distinguishes valid from invalid transfers of alienable rights.”).

51. *Id.* at 300.

52. *Id.* at 305; *see also* Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 655 (2012) (“To promise is to commit to do or refrain from doing something. To consent to contract is to commit to be legally responsible for nonperformance of a promise. So consent is a commitment in addition to whatever moral commitment inheres in a promise.”).

manifests her consent to be legally bound does she incur a contractual obligation.<sup>53</sup>

### 3. *Contract as Efficiency*

The efficiency theory of contract, as laid out recently by Alan Schwartz and Robert E. Scott, follows an economic analysis of contract negotiation, formation, and interpretation,<sup>54</sup> arguing that contract law “should facilitate the efforts of contracting parties to maximize the joint gains . . . from transactions.”<sup>55</sup> Contract law should “restrict itself to the pursuit of efficiency alone,”<sup>56</sup> under the simple premise that “the state should choose the rules that regulate commercial transactions according to the criterion of welfare maximization.”<sup>57</sup> In this vein, efficiency refers to “the relationship between the aggregate benefits of a situation and the aggregate costs of the situation.”<sup>58</sup> The efficiency theory of contract is thus utilitarian, “concerned with promoting rules that enhance societal wealth and utility.”<sup>59</sup> The literature interpreting contract in economic terms is extensive and takes many forms, including normative, descriptive, and interpretative models.<sup>60</sup> However, all economic contractual

53. Barnett, *supra* note 39, at 305; *see also* Barnett, *supra* note 52, at 647 (“Rather than embodying the morality of promise-keeping, the enforcement of contracts can best be explained and justified as a product of the parties’ consent to be legally bound.”). Jeffrey M. Lipshaw analyzes this split between the original promise and the subsequent legal contract, arguing that contracts “are constructs of a system of law, whereby the state agrees to enforce certain promises entered into in a certain form . . . . [T]here is nothing moral about the contract versus the underlying promise and . . . the conflation of the two is the source of the confusion over the limits of the law of contract. The moral or transcendental aspect of the contract is the underlying promise—its soul, so to speak—but the law can only doctor its body—what shows in the contract.” Lipshaw, *supra* note 47, at 323.

54. Schwartz and Scott are explicit that their theory applies only to contracts between “firms,” defined as corporations with five or more employees, limited partnerships, and professional partnerships such as law and accounting firms. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545 (2003). Contracts between other types of parties, they argue, should be the province of, *inter alia*, consumer, real property, securities, employment, and family law. *Id.* at 544. As one scholar has noted: “So limiting the theory’s domain makes an economic analysis more plausible.” Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 345 (2013).

55. Schwartz & Scott, *supra* note 54, at 544.

56. *Id.* at 545.

57. *Id.* at 544.

58. Barnett, *supra* note 39, at 277 (quoting A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1983)).

59. Samuel F. Ernst, *Pluralism Applied: A Concordant Approach to Selecting Contract Rules*, 101 MARQ. L. REV. 87, 87 (2017).

60. Zemach & Ben-Zvi, *supra* note 39, at 200 (“Normative economic analysis strives to identify and recommend the most efficient doctrinal rule, while descriptive economic theories hold that existing contract doctrine is best seen as serving the goal of maximizing welfare. An interpretive economic theory . . . combines normative and descriptive elements.”).

analysis in essence considers whether or not contracts maximize efficiency and what incentives they create for the parties, making contract “a vehicle for maximizing individual and social gains.”<sup>61</sup>

## II. LAW SCHOOL AGREEMENTS

In this section, we will analyze a series of agreements in the American law school context, by way of the required elements of a contract and the main academic theories of contract, in order to determine which, if any, of these agreements amount to a genuine, negotiated, democratic contract.

### A. *Agreements Between Governing Bodies and Law Schools*

This section will consider federal learning accommodations requirements under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (“ADA”). It will then analyze learning outcomes provisions under revised ABA standard 302 and the new “active learning” obligations laid out under ABA standard 304(c).

#### 1. *Learning Accommodations*

Under the Rehabilitation Act of 1973<sup>62</sup> and the Americans with Disabilities Act of 1990,<sup>63</sup> educational institutions, including law schools, are required to make reasonable accommodations for otherwise qualified students with disabilities.<sup>64</sup> The 2008 amendments to the ADA made clear that the definition of “disability” is to be broadly understood,<sup>65</sup> and although these amendments were intended to clarify matters, discussions and disagreements have continued.<sup>66</sup>

Under the definitions laid out in the Rehabilitation Act and the ADA, one scholar recently estimated that “approximately one in five

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61. *Id.* at 201.

62. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797(a) (1994)).

63. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 29 U.S.C. § 706, 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 152, 221, 611 (1994)).

64. Alexis Anderson & Norah Wylie, *Beyond the ADA: How Clinics Can Assist Law Students with “Non-Visible” Disabilities to Bridge the Accommodations Gap Between Classroom and Practice*, 15 CLINICAL L. REV. 1, 3 (2008).

65. Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?*, 22 AM. U. J. GENDER SOC. POL’Y & L. 519, 528 (2014) (citing 42 U.S.C. § 12101(b)(1) (2012)).

66. *Id.* at 546; *see also id.* at 557 (“The 2008 amendments further clarify that ‘reasonable modifications . . . shall be required, unless an entity can demonstrate that making such modifications . . . would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.’”) (quoting 42 U.S.C. § 12112(b)(5) (2012)).

Americans has a condition that would be considered a protected disability.”<sup>67</sup> In the law school context, studies suggest that “approximately ten percent of law students possess a physical or mental disability,”<sup>68</sup> while the number of students seeking accommodations is rapidly increasing.<sup>69</sup> Such accommodations are increasingly sought not just for physical disabilities, but also for a range of cognitive, mental health, and learning disabilities.<sup>70</sup> Law schools have responded by instituting protocols for addressing student disabilities in compliance with the law and by hiring administrators to oversee disability responses.<sup>71</sup> Common protocols adopted include providing administrative assistance, relieving students of certain requirements, or providing extra time to complete required tasks.<sup>72</sup>

However, such accommodations are not always implemented without issue. Most disability decisions in the law school context are the result of a case-by-case analysis, without the benefit of administrative proceedings or litigation, “and with only the guidance of elastic and elusive statutory and regulatory standards.”<sup>73</sup> Alexis Anderson and Norah Wylie have laid out a number of issues with disabilities and accommodations in the law school context, including, *inter alia*: (1) student under-reporting of disabilities out of shame or fear of discrimination; (2) faculty’s lack of training to assist students with disabilities; (3) disability accommodations raising equity issues for other students in the same classes; (4) lack of appropriate career counseling for disabled students; (5) absence of adequate training for disabled students regarding how to work and succeed in practice.<sup>74</sup> Others have pointed to the increasing concern

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67. *Id.* at 545.

68. Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 1 (1999) (citing Laura F. Rothstein, *Disability Issues in Legal Education: A Symposium*, 41 J. LEGAL EDUC. 301, 305 (1991); Laura F. Rothstein, *Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities*, 17 J.C. & U.L. 471, 471 (1991)); *see also* Anderson & Wylie, *supra* note 64, at 6 (“[S]tudies have shown a steady increase in the number of law students with disabilities since passage of the ADA.”).

69. Smith, *supra* note 68; *see also* Anderson & Wylie, *supra* note 64, at 6.

70. Anderson & Wylie, *supra* note 64, at 4 (citing Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219, 220 (2004); Donald Stone, *The Impact of Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 570 (1996)).

71. Anderson & Wylie, *supra* note 64, at 6.

72. Smith, *supra* note 68, at 64; *see also* Anderson & Wylie, *supra* note 64, at 4 (“Notetakers, special testing and attendance rules, and access to academic support programs are common features of most law schools’ disability law protocols.”); Rothstein, *supra* note 65, at 556-57 (“Two primary types of reasonable accommodations are available for individuals: the provision of auxiliary aids and services; and the modification of policies, practices, and procedures.”).

73. Smith, *supra* note 68, at 2.

74. Anderson & Wylie, *supra* note 64, at 15-16.

about stress and its impacts on students in general and law students in particular.<sup>75</sup>

Some scholars have suggested that, although law schools are not required to proactively identify and reach out to students with disabilities, law schools would best serve themselves and their students by implementing appropriate outreach, starting from the admissions process and continuing through orientation, classes, and exam administration.<sup>76</sup> The experiences of the increasing number of law students with disabilities are strongly affected by faculty attitudes, faculty approaches, and law school policies and procedures.<sup>77</sup> The measure of reasonable accommodation, writes Kevin Smith, should be whether the law school “acts proactively to assist the student in constructing an individualized, comprehensive accommodation program which takes into account the student’s long-term educational, personal, and professional *best interests*.”<sup>78</sup>

Learning accommodations requirements are handed down from the federal government to all American law schools. They are not the product of an offer from the government, nor of an acceptance on the part of the law schools, which are required by law to abide by the terms of the Rehabilitation Act and the ADA. There is no bargained-for performance or return promise, and therefore no consideration. And because there is no offer or acceptance, there is no mutual intent. Therefore, learning accommodations are not contracts under the terms of the Restatement, but are closer to regulations handed down from above that must be followed. Even to the extent a contract could be found here, it would be a contract of adhesion, defined as one “usually prepared in printed form, drafted unilaterally by the dominant party and then presented on a take it or leave it basis to the weaker party who has no real opportunity to bargain about its terms.”<sup>79</sup>

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75. Rothstein, *supra* note 65, at 594 (“More attention is being paid to what to do about the impact of stress during law school. One of the major concerns beyond recognition of the need to do more is the availability and affordability of mental health services and whether such treatment will remain confidential.”).

76. *Id.* at 574.

77. *Id.* at 601-02.

78. Smith, *supra* note 68, at 106. It should be noted, however, that the creation of any individualized plan for student accommodations relies on the professor’s knowledge of the disability, which is often kept private by law school policy. See, e.g., Stone, *supra* note 70, at 574 (“Law faculty presumably carry the same misunderstandings about persons with disabilities.” According to at least one law school official, in order to protect student anonymity, professors have no knowledge of the disabilities of their students.).

79. 17A AM. JUR. 2D *Contracts* § 274 (2018) (“Contracts of adhesion are enforceable unless they are unconscionable, and the presence of an adhesion contract alone does not require a finding of procedural unconscionability. Nevertheless, the fact that a contract is one of ad-



In terms of contract theory, learning accommodations requirements do not fall under either the promise or consent theories,<sup>80</sup> because learning accommodations are not the result of any promises between or consent of the parties—or even any negotiation between them. In sum, the relationship between the federal government and law schools regarding learning accommodations is not contractual at all, but regulatory, with the rules being handed down from the government for the law schools to implement.

## 2. *Learning Outcomes*

In 2014, the ABA, responding to what some have called the “drum beat” of a new emphasis on the assessment of student learning outcomes in American legal education,<sup>81</sup> revised its law school accreditation standards to require the establishment of learning outcomes,<sup>82</sup> the monitoring of student learning, and the self-evaluation of law programs to ensure graduates’ achievement of the core competencies of the professional lawyer.<sup>83</sup> These revisions (the “Revised Standards”) “are extensive and, for the first time, draw explicitly from education and learning theory to focus on what students are learning as opposed to what law schools teach.”<sup>84</sup> The revised ABA standard 302 sets forth the minimum requirements for accredited law schools:<sup>85</sup>

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hesion is a strong indicator that the contract is procedurally unconscionable because it suggests an absence of meaningful choice. Therefore, courts determining the validity of a contract often begin with assessing whether the contract is one of adhesion.”).

80. However, it must be noted that learning accommodations are clearly the result of an attempt by the federal government to implement economic efficiency. Further, the resulting efforts by American law schools to implement these requirements are also “a vehicle for maximizing individual and social gains.” Zemach & Ben-Zvi, *supra* note 39, at 201.

81. Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 269 (2010); *see also id.* at 270 (“[A] system of assessing student learning outcomes seeks to measure how well a population of students is accomplishing stated objectives and, accordingly, how effectively the institution is supporting them in achieving those objectives.”).

82. Sarah Valentine, *Flourish or Founder: The New Regulatory Regime in Legal Education*, 44 J.L. & EDUC. 473, 508 (2015).

83. Charles P. Cercone & Adam Lamparello, *Assessing A Law School’s Program of Legal Education to Comply with the American Bar Association’s Revised Standards and Maximize Student Attainment of Core Lawyering Competencies*, 86 UMKC L. REV. 37, 42 (2017).

84. Valentine, *supra* note 82, at 507; *see also* Cara Cunningham Warren, *Achieving the American Bar Association’s Pedagogy Mandate: Empowerment in the Midst of A “Perfect Storm”*, 14 CONN. PUB. INT. L.J. 67, 67-68 (2014) (“The American Bar Association’s . . . pedagogy mandate . . . marks a ‘quantum shift’ in legal education, moving its center from teaching to learning and from curriculum to outcomes (i.e., ‘from what is delivered to students to what students take away from their educational experience’).”) (footnotes omitted).

85. Valentine, *supra* note 82.

## Standard 302. LEARNING OUTCOMES

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.<sup>86</sup>

These new requirements mark a significant change of opinion regarding the proper framework of legal education on the part of the ABA and the legal academy more generally.<sup>87</sup>

In practice, every law school now must articulate clearly, in writing, what its students should be capable of upon graduation—its desired “learning outcomes.”<sup>88</sup> Then the school must determine how it will assess its students’ success at achieving these outcomes.<sup>89</sup> Such assessment “relies on [identifying], and if necessary, changing teaching methods and inputs to ensure student success in meeting learning objectives. It replaces the mystique of [the] Socratic approach with transparency about learning objectives and teaching methods.”<sup>90</sup> Under this framework, “the role of the professor is not to deliver information but to design effective learning experiences so that students achieve the course outcomes.”<sup>91</sup>

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86. *Id.* at 509 (quoting STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, PROGRAM OF LEGAL EDUCATION § 302 (AM. BAR ASS’N 2014)).

87. *See, e.g.*, Crossley & Wang, *supra* note 81 (“In comparison to other realms of professional education, legal education has remained fairly naïve about the idea that schools should seek to assess whether their students, as a group, are achieving the educational objectives embraced by the school.”).

88. *Id.* at 270.

89. *Id.* at 271.

90. Warren, *supra* note 84, at 68-69 (first alteration in original) (quoting Ruth Jones, *Assessment and Legal Education: What Is Assessment, and What the \*# Does It Have to Do with the Challenges Facing Legal Education?*, 45 MCGEORGE L. REV. 85, 103 (2014)).

91. *Id.* at 69 (quoting Janet W. Fisher, *Putting Students at the Center of Legal Education: How An Emphasis on Outcome Measures in the A.B.A. Standards for Approved Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 237 (2010)).

The introduction of the Revised Standards has also raised questions. For instance, what knowledge or skills amount to “competency,” and how should competency be measured?<sup>92</sup> Also, what types of student assessment are sufficient to satisfy the Revised Standards, and how should law schools address the inevitable subjectivity problems associated with student evaluation?<sup>93</sup> In order to address these and other issues, scholars have begun to set forth principles to guide law schools in their implementation of the new standards.<sup>94</sup> According to Charles Cercone and Adam Lamparello, the required learning outcomes, and the assessment thereof, “should be developed through a collaborative and faculty-driven process, and each outcome should be focused on training students to develop the practical skills necessary to effectively practice law.”<sup>95</sup>

Despite the general buy-in of most law faculties, the ABA’s Revised Standards, like the learning accommodations requirements under the Rehabilitation Act and the ADA, are closer to regulations than contracts. The implementation of the Revised Standards is required by the ABA in order for law schools to attain or maintain accreditation. The Revised Standards themselves therefore cannot be considered an offer, which is “the manifestation of willingness to enter into a bargain.”<sup>96</sup> Law schools also cannot be said to have “accepted” the terms of the Revised Standards, because to reject them would mean losing accreditation, resulting in the near-certain collapse of the institution. It might be argued that there is consideration in that the ABA promises accreditation while the law school promises to follow the Revised Standards. However, because both offer and acceptance are lacking, there is no mutual intent, and therefore no contract. Instead, the Revised Standards are regulatory requirements handed down by the ABA as the regulating body. Again, even to the extent that any contract is formed with respect

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92. Abigail Loftus DeBlasis, *Building Legal Competencies: The Montessori Method As a Unifying Approach to Outcomes-Based Assessment in Law Schools*, 42 OHIO N.U. L. REV. 1, 21 (2015).

93. Cercone & Lamparello, *supra* note 83, at 45.

94. See, e.g., *id.* at 48-49 (laying out the following six steps: “(1) developing program-wide learning outcomes; (2) developing outcome-specific skills; (3) incorporating outcome-specific skills into all syllabi and grading rubrics to enable course-specific assessment; (4) mapping outcome-specific skills throughout the entire curriculum on a course and program-specific (departmental) basis, and program-wide basis; (5) measuring student attainment of a law school’s learning outcomes; and (6) using this information to comprehensively assess the curriculum on a program-wide, program-specific, and course-specific basis, make changes where appropriate”); Valentine, *supra* note 82, at 529-38 (laying out “Seven Principles to Guide Transformation”).

95. Cercone & Lamparello, *supra* note 83, at 50.

96. RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981).

to the Revised Standards, such a contract would be a contract of adhesion, “presented on a take it or leave it basis to the weaker party who has no real opportunity to bargain about its terms,”<sup>97</sup> strongly indicating that “the contract is procedurally unconscionable because it suggests an absence of meaningful choice.”<sup>98</sup>

Analyzed under contract theory, the ABA’s Revised Standards—like the various learning accommodations required by the federal government—do not fit either the promise or consent theories. The Revised Standards are handed down from above, in this case by the ABA—the governing body of the legal profession—which has the power to accredit (and de-accredit) all American law schools. There is no promise in this arrangement, and no genuine consent. There is an element of efficiency in that the Revised Standards are presented by the ABA and accepted by the law schools as “a vehicle for maximizing individual and social gains.”<sup>99</sup> But in all, the ABA’s learning outcomes requirements are not contractual, but rather mere regulatory measures.

### 3. *Learning Outcomes*

The legal academy has also lately recognized the advantages of active learning over more traditional lecture and Socratic method pedagogies. As one scholar points out, “[l]egal educators have been reminded and remonstrated repeatedly that by divorcing practice from theory in our teaching, we are failing to educate our students adequately.”<sup>100</sup> Many have noted that providing students with opportunities to simulate legal practice, including through clinical practice, enhances students’ judgment as well as their analytical, reasoning, and problem-solving skills.<sup>101</sup> Active learning has also been shown to increase content retention, develop problem-solving skills, and increase motivation.<sup>102</sup> In the law school context, Alyson Drake argues that active learning methods provide an effective change-of-pace from traditional lectures and encourage students to

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97. 17A AM. JUR. 2D *Contracts* § 274 (2018).

98. *Id.*

99. Zemach & Ben-Zvi, *supra* note 39, at 201.

100. David B. Oppenheimer, *Using A Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution*, 65 J. LEGAL EDUC. 817, 819 (2016) (citing, *inter alia*, The MacCrate report, the Carnegie report, Best Practices for Legal Education, and Transforming the Education of Lawyers).

101. *Id.* at 820; *see also* Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744, 762 (2016) (“At this point in legal education, the gains of active learning methods are well-established. Active learning methods, as opposed to passive learning, ‘require students to engage in higher-order thinking such as analysis, synthesis, and evaluation.’”) (footnotes omitted).

102. Bartholomew, *supra* note 101.

work harder because, in an active learning setting, the professor monitors each student's progress much more closely.<sup>103</sup>

The ABA, apparently agreeing with such analyses, recently revised its Accreditation Standards to require certain aspects of active learning in the externship context:

A field placement course [must include] the following: . . . (iii) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles of faculty and any site supervisor in supervising the student and in assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student's academic performance . . .

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The ABA thus now demands a written agreement among the student, the professor, and the supervisor at the placement, laying out the terms of the externship, including active learning requirements,<sup>105</sup> designed to allow students "to begin forming their professional identities."<sup>106</sup>

The new active learning mandate is a further regulatory requirement set out by the ABA for all accredited American law schools. Therefore, like the ABA's Revised Standards, the active learning requirements are the result of neither an offer on the part of the ABA nor an acceptance on the part of the law schools. Arguably, there is consideration in the ABA's promise of accreditation and the law school's promise to follow the active learning requirements. But, again, there is no mutual intent, and therefore no contract, because both offer and acceptance are lacking. Thus, the active learning requirements, like the ABA's Revised Standards, are

103. Alyson M. Drake, *The Need for Experiential Legal Research Education*, 108 LAW LIBR. J. 511, 521 (2016).

104. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, PROGRAM OF LEGAL EDUCATION § 304(c) (AM. BAR ASS'N 2016-17).

105. *Id.*

106. Drake, *supra* note 103, at 521-22 ("This overarching goal [the development of practice-ready skills], then, encompasses many smaller goals, including 'engaging students, understanding unequal social structures, advancing social justice, developing lawyering skills, cultivating professional identity, fostering professional ethics, providing culturally competent client representation to a diverse array of clients, developing sound judgment and problem-solving abilities, gaining insight into law and the legal system, promoting lifelong learning, and learning to work collaboratively.'") (quoting Deborah Maranville et al., *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517, 527 (2011-2012)).

closer to regulations handed down from above than to contracts. Further, even were a contract to be formed, it would be a contract of adhesion, likely unconscionable because it “suggests an absence of meaningful choice.”<sup>107</sup>

Under contract theory, the active learning requirements also do not fit either the promise or consent theories due to the lack of meaningful promise or consent. Perhaps there is an element of economic efficiency in the law schools’ agreement to abide by the active learning requirements, but in the end these requirements are handed down by the ABA and are therefore closer to regulations than to any contractual agreement between the ABA and the law schools it oversees.

### *B. Agreements Between Law Schools and Professors*

The principal agreements between law schools and their professors concern employment. Traditionally, employment has been regarded as a contract<sup>108</sup>—the sale of one’s labor in return for a salary, “negotiated in much the same way as any other contract, and depending entirely on the terms to which the parties agree.”<sup>109</sup> However, according to recent scholars, labor law before the industrial age instead treated the relationship between employer and employee (accurately, in this author’s opinion) as a master-servant relationship, whereby the servant owed his master work in return for economic support.<sup>110</sup>

By contrast, contract law arose in the very different realm of commercial dealings, mostly between merchants and between sellers and purchasers of real property—scenarios that differ sharply from

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107. 17A AM. JUR. 2D *Contracts* § 274 (2018).

108. Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 1 (2003) (citing Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 406 (1995)).

109. Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 36 (2003); see also Jeffrey D. Jones, *The Public’s Interest in “Private” Employment Relations*, 16 LEWIS & CLARK L. REV. 657, 661 (2012) (“The moral intuitions and norms that inform contract law are, in the first instance, imported into employment law and made its foundation.”).

110. Snyder, *supra* note 109, at 37-38. This includes the traditional notion of at-will employment, whose support continues to this day and which, according to one scholar, “draws its strength from the deeply rooted conception of the employment relation as a dominant-servient relation rather than one of mutual rights and obligations. The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his or her employee subjects.” Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000).

early master-servant-based employment law in that participation in such commercial dealings is almost entirely voluntary and the participants are, for the most part, equals.<sup>111</sup>

Employment law and contract law came together in the years following the American Revolution, which led to a general belief that (at least with respect to free white male citizens) “employment is simply a contract between parties . . . . In the eye of the law, [employer and employee] are both freemen—citizens having equal rights, and brethren having one common destiny.”<sup>112</sup> However, as scholars have noted, the legal philosophy of employment as contract has never quite matched reality,<sup>113</sup> and the continuing relevance of status, as opposed to contract, in employment law is reflected by the passage of numerous public labor laws and regulations<sup>114</sup> throughout the 20th Century reflecting little, if any, regard for the desires of specific employers or employees.<sup>115</sup> In fact, employment today “is regulated by law in a host of ways entirely unrelated to the agreement of the parties, dependent solely upon the relative status of parties as employer and employee.”<sup>116</sup>

Today, the default understanding of the employment relationship is that it is at-will, whereby either employer or employee may end the relationship whenever it is in their interests—outside of prohibitions on wrongful termination due to discrimination or retaliation.<sup>117</sup> However, as some have noted, “the at-will rule has become

111. Snyder, *supra* note 109, at 39.

112. *Id.* at 43 (quoting OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, at 550 (Boston 1853) (address delivered by Henry Williams)).

113. See, e.g., Arnow-Richman, *supra* note 108, at 2-3 (noting that contract law requires mutual assent and consideration, while workplace agreements often lack such formalities, leading to a situation where the substance of the commitment “may be vague and indefinite, particularly if it is made orally”).

114. E.g., Occupational Safety and Health Act (OSHA) of 1970, Pub. L. No. 91-956, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (2012)); Employment Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2012)).

115. Snyder, *supra* note 109, at 45-46.

116. *Id.* at 34; see also Jones, *supra* note 109, at 662 (arguing for a public interest in private employment relations that subordinates contract and property law to “a larger redistributive employment ideal”).

117. See David Anthony Rutter, *Title VII Retaliation, A Unique Breed*, 36 J. MARSHALL L. REV. 925, 925 (2003) (“The source of protection for employees in the private sector comes from Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits employers from discriminating against employees because of their race, color, religion, sex or national origin. A lesser known, although equally important section of Title VII, intended to serve as a guardian over the anti-discrimination section of Title VII, is the anti-retaliation section of Title VII.”).

a much stickier default in many jurisdictions, rolling like a steamroller over evidence of contrary intent.”<sup>118</sup> Beyond the at-will presumption, some scholars argue that, rather than any formal employment contract (which is generally absent), the norms of each workplace combine to form “a relational contract, which is more important to the parties in most situations than any formal written agreement.”<sup>119</sup>

In the law school context, there are a number of different types of employment agreements between professors and the law school, usually based on the particular professor’s status. As Debra Moss Curtis explains it, “Generally a law school faculty includes a variety of categories of teachers, including full-time faculty and adjunct faculty, tenured professors and those hoping to someday get tenure, and faculty with short term contracts, long term contracts, or no contracts.”<sup>120</sup> Of these distinctions, the most significant, perhaps, is between those professors with tenure (or the possibility of tenure) and those without.

Generally speaking, non-tenured and non-tenure-track law professors fall into three camps: adjuncts, legal research and writing (“LRW”) professors, and clinicians. The employment of adjunct professors aligns closely with typical at-will employment.<sup>121</sup> Contractually speaking, LRW professors fall somewhere between adjuncts and tenured and tenure-track faculty, being typically hired on renewable short-term contracts.<sup>122</sup> For clinicians, the employment landscape is more varied. Clinics employ “many different staffing

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118. Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment at-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 225 (2017) (citing Deborah A. DeMott, *Investing in Work: Wilkes as an Employment Law Case*, 33 W. NEW ENG. L. REV. 497, 509 (2011)).

119. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 150 (2005).

120. Debra Moss Curtis, *Everything I Wanted to Know About Teaching Law School I Learned from Being a Kindergarten Teacher: Ethics in the Law School Classroom*, 2006 BYU EDUC. & L.J. 455, 457 (2006).

121. See James Wong, *Become an Adjunct*, 28 NO. 5 ACC DOCKET 14, 14 (2010) (“[A]n adjunct . . . is an independent contract worker in academia. The contract can be for the period of a term, a year or longer. The position can be full-time, but is usually part-time. Normally, but not always, a payment is made either through the university’s payroll system—or less often as 1099 MISC nonemployee income.”).

122. Katerina P. Lewinbuk, *Hard to Build, but Easy to Destroy?: Will Chaos in Legal Education Lead to Restructuring of Law Schools and Elimination of Faculty Tenure?*, 39 J. LEGAL PROF. 1, 15 (2014); see also Emily Grant, *Toward A Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371, 379 (2003) (“The predominant model for hiring full-time LRW instructors involves renewable contracts.”); Catherine J. Wasson & Barbara J. Tyler, *How Metacognitive Deficiencies of Law Students Lead to Biased Ratings of Law Professors*, 28 TOURO L. REV. 1305, 1320 (2012) (“The overwhelming majority of legal writing professors, regardless of their length of experience, work on short-term contracts, with little if any security of position.”).



arrangements, including traditional tenured or tenure-track professors, clinic tenured or clinic tenure-track professors, contract-term professors, visitors, adjuncts, and staff attorneys, who may be on contracts or funded by grants. Many clinics use a combination of these employment arrangements.”<sup>123</sup>

By far the most significant and well-known employment arrangement in the law school setting is the tenure track, and its ultimate result—tenure itself. Academic tenure, “accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause.”<sup>124</sup> Even under this limited definition, tenure significantly “changes the employment-at-will relationship, in which an employee can be terminated for any reason . . . .”<sup>125</sup> In this sense, tenure is “a type of option—where the school is bound to employ the tenured professor if she decides to come back year after year unless there is adequate cause for termination, but where the professor is free to leave after any year without any binding obligation to the school.”<sup>126</sup> In any event, the exact parameters of tenure are set out by the rules and regulations of each individual institution.<sup>127</sup>

123. Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. REV. 351, 359 (2004).

124. John M. Badagliacca, *The Decline of Tenure: The Sixth Circuit’s Interpretation of Academic Tenure’s Substantive Protections*, 44 SETON HALL L. REV. 905, 905 (2014) (quoting William Van Alstyne, *Tenure: A Summary, Explanation, and “Defense”*, 57 AAUP BULL. 328, 328 (1971)).

125. Lewinbuk, *supra* note 122, at 13-14 (quoting Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 74 (2006)); *but see* Badagliacca, *supra* note 124, at 906 (noting that the court in *Branham v. Thomas M. Cooley Law School*, 689 F.3d 558 (6th Cir. 2012) found tenure to be no more than a vehicle for academic freedom, “while providing no legal authority for continuous employment *outside of their employment contracts*” (emphasis added)). This holding “set a precedent against the legal significance of tenure status and bolstered the importance of employment contracts for graduate professors.” Badagliacca, *supra* note 124, at 916.

126. Badagliacca, *supra* note 124, at 928. The protections provided by tenure, however, change based on whether the law school is a public or private institution. *See, e.g.*, Mark Strasser, *Tenure, Financial Exigency, and the Future of American Law Schools*, 59 WAYNE L. REV. 269, 271 (2013) (“Tenure creates a property interest protected under the United States Constitution if the tenure grantor is a state entity. Because state action is required to trigger the relevant constitutional guarantees, the Constitution as a general matter does not afford protection to tenure violations at a private institution. Instead, those rights will be protected as a matter of contract . . .”).

127. *See* Strasser, *supra* note 126, at 309 n.15 (quoting Steven G. Olswang et al., *Retrenchment*, 30 J.C. & U.L. 47, 48-49 (2003)) (“The fundamental source of authority, and the first place to look, is the institution’s own rules and regulations. An institution’s policies frame the relationships among the faculty, staff, students, and institution. . . . Some or all such

Being so varied, law professor employment agreements naturally fall into different categories, supported by different contractual and legal bases. However, standard adjunct contracts, renewable short-term contracts typical of LRW professors and clinicians, and most tenure-track positions are all typical at-will employment agreements. Such agreements include an offer of employment by the law school and acceptance of that offer by the professor. Consideration consists of the professor's promise to teach the assigned course in exchange for the law school's promise to pay a salary. There is also plainly mutual intent to enter into the agreement.

Where such agreements fail to amount to genuine democratic contracts lies precisely in their at-will nature. In the United States, "[e]mployment is presumed to be at will unless an express or implied contract states otherwise and such presumption is strong."<sup>128</sup> At-will employment "is presumptively terminable at any time, with or without cause, by either party."<sup>129</sup> As a result, an at-will employee "simply has no legally protected interest in his or her employment."<sup>130</sup> Such flimsy agreements—resulting in no legally protected interest—cannot properly be considered contracts.

The employment contracts of tenured professors satisfy the same elements as those of their untenured colleagues—there is an offer of employment and an acceptance of that offer, consideration in the form of teaching classes and salary paid, and mutual intent to enter into the agreement. Where tenure differs is precisely in the employment guarantees made by the law school to the tenured professor, which significantly alter the presumptively at-will employment agreement. Such an alteration is perfectly legitimate. "The employment-at-will doctrine is a rule of contract construction, not a rule imposing substantive limitations on the parties' freedom to contract; . . . 'if the parties include a clear job security provision in an employment contract, the presumption that the employment is at-will may be negated.'"<sup>131</sup>

However, the fact that tenured employment is not strictly speaking "at-will" does not make this employment agreement a genuine contract. Instead, as should be perfectly clear, tenure protects only one party to the agreement—the professor. In fact, "[a]n employee is never presumed to engage his services permanently, . . . indeed,

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policies constitute, or at least supplement, the contract between the institution and its faculty. . . . Tenure can mean whatever the parties—limited by the relevant institutional policies and statutes—define it to mean.").

128. 27 AM. JUR. 2D *Employment Relationship* § 9 (2018).

129. 82 AM. JUR. 2D *Wrongful Discharge* § 2 (2018).

130. 27 AM. JUR. 2D *Employment Relationship* § 9 (2018).

131. 19 WILLISTON ON CONTRACTS § 54:39 (4th ed. 2018) (footnotes omitted).

in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend.”<sup>132</sup> Further, significantly, “if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of ‘mutuality.’”<sup>133</sup> Therefore, even tenured employment agreements would not appear to be genuine democratically negotiated contracts.

In terms of Contract theory, adjunct contracts, as purely at-will agreements on both sides, include few, if any, promises—the professor may leave or be fired at any time. Neither is consent the basis of these contracts, because the at-will nature of the contract does not involve the transfer of any rights between the parties. In effect, the at-will employment contract is an agreement based on efficiency alone: as long as it is economically sensible for the law school to employ the adjunct, and for the adjunct to perform the requisite tasks for the offered pay, employment will continue. When such efficiency is lacking for either party, employment ends and the contract is void.

The renewable short-term contracts under which most LRW professors and many clinicians work involve something closer to promise, in that even the shortest such contracts lay out a period of employment during which time the professor is promised a job (absent firing for cause). However, this promise also goes in only one direction, because as a general matter the professor is free to leave at any time, without penalty. For the same reason, such contracts are not contracts of consent (as understood in contract theory) because there is no “transfer of rights” from the professor to the law school; the professor retains his or her rights in their entirety. Arguably, such contracts do reflect a basis in economic efficiency, because law schools are undoubtedly offering as much as needed (and no more) to attract qualified candidates for professor positions, while eager professors will accept what they require in compensation (and no less) to perform the requisite duties. In this way, such agreements may indeed be vehicles “for maximizing individual and social gains.”<sup>134</sup>

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132. *Id.* (quoting *Seals v. Calcasieu Parish Voluntary Council on Aging, Inc.*, 758 So. 2d 286, 289 (La. Ct. App. 3d Cir. 2000), writ denied, 761 So. 2d 1292 (La. 2000)).

133. *Id.* (quoting *Seals*, 758 So. 2d at 289); *see also id.* (“[S]uch contracts frequently are, in practical effect, unilateral undertakings by the employer to provide a job for so long as the employee wishes to continue in it but impose no corresponding obligation upon the employee. When this is the case, the burden of performance is unequal, as the employer appears to be bound to the terms of the contract, while the employee is free to terminate it at will.”).

134. Zemach & Ben-Zvi, *supra* note 39, at 201.

Tenure-track positions also bear little relationship to promise, outside of the specified term of the law school's offer letter—a promise that in any event flows in only one direction, because the professor may leave at any time. With respect to tenure, the law school promises only to consider the faculty member's application for tenure when the time comes—being free, of course, to deny it—while the professor promises nothing, and may leave the law school at any time for any reason, or for no reason at all. There is also no consent manifested by either the law school or the tenure-track professor, because no entitlements are being transferred from either party to the other and neither is legally bound to do anything more than maintain the at-will employment relationship until one party or the other chooses to sever it. This sort of contract too can only be understood as a form of economic efficiency, in which the agreement “facilitate[s] the efforts of [the] parties to maximize the joint gains . . . from transactions.”<sup>135</sup>

Only with the granting and acceptance of tenure, then, do we see anything different in the employment relationship between law schools and law professors. With the tenure offer, the law school promises something significant—the security of employment that may be maintained indefinitely, absent only adequate cause for dismissal. However, the tenured law professor still manages to promise little or nothing, as he or she may always leave, for any reason. There is also little “consent” in the tenure context, because the professor who accepts tenure may still resign his or her post at any time, and does not thereby transfer any significant rights or entitlements to the law school. Finally, like all the professor contracts here discussed (and perhaps all employment contracts), there is an efficiency aspect to the granting and acceptance of tenure. Both parties to the tenure agreement surely accept the terms out of a desire to maximize individual and social gains—the law school by maintaining an experienced, committed faculty, and the professor by the tangible security and intellectual and emotional support that tenure provides.

### *C. Agreements Between Law Schools and Students*

Numerous agreements are formed every year between law schools and their students. In this section we will consider the most important of them, including academic oaths, law school honor codes, and student handbooks.

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135. Schwartz & Scott, *supra* note 54, at 544.

# 1. Academic Oaths

Many law schools require their incoming students to take a professionalism oath at the start of 1L year.<sup>136</sup> The number of schools administering such oaths to entering law students appears to be on the rise, with many of these oaths being administered recently for the first time.<sup>137</sup> The reason cited by some law school deans for such oaths is to create a way for incoming students to understand the responsibilities of entering a profession, with the inspiration of medical schools' "white-coat" ceremonies often cited.<sup>138</sup>

The content of these professionalism oaths naturally varies, but there are a number of notable through-lines. Many start with an acknowledgment of the privileges, duties, and responsibilities of becoming a lawyer.<sup>139</sup> They demand that students conduct themselves with dignity,<sup>140</sup> integrity,<sup>141</sup> civility,<sup>142</sup> courtesy,<sup>143</sup> and respect.<sup>144</sup> A number of the oaths require action without prejudice and with respect for the rights and dignity of others.<sup>145</sup> Many of these oaths also lay out the responsibilities and high ideals inherent

136. See, e.g., *Professionalism Oaths for Incoming Classes*, WASHBURN U. SCH. L., <http://washburnlaw.edu/students/honorcode/oaths.html> (last visited Sept. 10, 2018) [hereinafter WASHBURN]; *School of Law: Oath of Professionalism*, U. DAYTON, [http://www.udayton.edu/law/students/professionalism\\_oath.php](http://www.udayton.edu/law/students/professionalism_oath.php) (last visited Sept. 10, 2018) [hereinafter DAYTON].

137. See, e.g., Sandwell-Weiss, *Class of 2015 Takes Professionalism Oath*, U. ARIZ. (Aug. 21, 2012), <https://law.arizona.edu/news/2012/08/class-2015-takes-professionalism-oath> (first professionalism oath administered August 17, 2012) [hereinafter ARIZONA]; WASHBURN, *supra* note 136 (professionalism oath finalized and administered beginning fall 2014).

138. See, e.g., ARIZONA, *supra* note 137.

139. See, e.g., *Atlanta's John Marshall Law School Orientation on Professionalism*, JOHN MARSHALL L. SCH. (Aug. 16, 2014), <http://www.johnmarshall.edu/wp-content/uploads/Convocation-Materials.pdf> [hereinafter JOHN MARSHALL]; DAYTON, *supra* note 136; *Incoming Law Students Take Oath of Professionalism*, U. SAN DIEGO (Aug. 17, 2016), [http://www.sandiego.edu/news/detail.php?\\_focus=56021](http://www.sandiego.edu/news/detail.php?_focus=56021) [hereinafter SAN DIEGO]; *Student Professionalism Oath*, U. S.C. SCH. L., [http://sc.edu/study/colleges\\_schools/law/internal/current\\_students/\\_documents/student\\_oath.pdf](http://sc.edu/study/colleges_schools/law/internal/current_students/_documents/student_oath.pdf) (last visited Sept. 10, 2018) [hereinafter SOUTH CAROLINA].

140. DAYTON, *supra* note 136; JOHN MARSHALL, *supra* note 139; SOUTH CAROLINA, *supra* note 139; SAN DIEGO, *supra* note 139.

141. JOHN MARSHALL, *supra* note 139; *Law Students' Pledge*, U. HAW. MANOA WILLIAM S. RICHARDSON SCH. L., <http://www.law.hawaii.edu/students/law-students-pledge> (last visited Sept. 10, 2018) [hereinafter HAWAII]; SOUTH CAROLINA, *supra* note 139; SAN DIEGO, *supra* note 139.

142. DAYTON, *supra* note 136; JOHN MARSHALL, *supra* note 139; HAWAII, *supra* note 141; SOUTH CAROLINA, *supra* note 139.

143. JOHN MARSHALL, *supra* note 139; SAN DIEGO, *supra* note 139; WASHBURN, *supra* note 136.

144. DAYTON, *supra* note 136; SAN DIEGO, *supra* note 139; WASHBURN, *supra* note 136 (adding the significant pledge that students will also treat themselves with respect).

145. JOHN MARSHALL, *supra* note 139; SOUTH CAROLINA, *supra* note 139; HAWAII, *supra* note 141 (pledging "[t]o advance the interests of those I serve before my own, . . . [t]o guard zealously legal, civil and human rights which are the birthright of all people, [a]nd above all, [t]o endeavor always to seek justice").

in the learned profession of the law,<sup>146</sup> noting that students' actions reflect not only upon themselves, but also upon the university and the legal profession.<sup>147</sup> The oaths also ask students to pledge diligent performance of their duties and responsibilities in law school, including being prepared for class, studying hard, and upholding standards of academic integrity and ethics.<sup>148</sup> The vows are "solemn[],"<sup>149</sup> and often end with the phrase, "This pledge I take freely and upon my honor."<sup>150</sup>

It may not seem like much these days to take a pledge *upon my honor*, but such oaths tend to have a stronger impact than one might expect. The psychology of an oath, especially the physical act itself "may heighten an otherwise nebulous concept into a moral obligation."<sup>151</sup> This is particularly true at the start of law school, where students are acutely aware of entering a new profession, with new rules and responsibilities.<sup>152</sup> According to Carol Rice Andrews, "Even the simple oath can prompt ethical reflection, as the actual act of taking the oath is a moment of high ethical aspiration."<sup>153</sup>

However, not all observers are quite so sanguine about these increasingly popular oaths. For instance, Robert Steinbuch writes that he views "with significant skepticism the growing movement at law schools wherein brand new students are asked to swear to professionalism oaths."<sup>154</sup> Steinbuch notes that the entering students rarely, if ever, have any say in the drafting of the oaths and are asked to swear to them without any consideration in return.<sup>155</sup> Further, because the oaths set out largely undefined obligations

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146. DAYTON, *supra* note 136; JOHN MARSHALL, *supra* note 139.

147. DAYTON, *supra* note 136; WASHBURN, *supra* note 136; SOUTH CAROLINA, *supra* note 139; SAN DIEGO, *supra* note 139.

148. JOHN MARSHALL, *supra* note 139; WASHBURN, *supra* note 136; SOUTH CAROLINA, *supra* note 139; SAN DIEGO, *supra* note 139; HAWAII, *supra* note 141.

149. WASHBURN, *supra* note 136; SOUTH CAROLINA, *supra* note 139.

150. DAYTON, *supra* note 136; JOHN MARSHALL, *supra* note 139; SAN DIEGO, *supra* note 139.

151. Heidi K. Brown, *Converting Benchslaps to Backslaps Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMM. & RHETORIC 109, 146 (2014).

152. See *id.* (citing TIMOTHY MAZUR, COMPLIANCE PROGRAMS & THE CORPORATE SENTENCING GUIDELINES § 12:28 (2013) (discussing the act of signing an honor code or honesty pledge and suggesting how "delivering a message promoting compliance immediately prior to a moment of risk can have a powerful, positive impact on behavior")); Lipshaw, *supra* note 47, at 334 (discussing precontractual negotiations, and suggesting that a "ritual act, like signing, dripping wax, or stitching with special string, changes its legal character").

153. Brown, *supra* note 151 (quoting Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 55 (2009)).

154. Robert Steinbuch, *The Problem with Forcing Law Students to Take Professionalism Oaths*, NAT'L JURIST (Oct. 10, 2014, 8:37 AM), <http://www.nationaljurist.com/national-jurist-magazine/problem-forcing-law-students-take-professionalism-oaths>.

155. *Id.*

such as “professionalism,” the students do not know what they are promising and the schools do not know what their students have promised, leading to possible under- or over-enforcement issues.<sup>156</sup> Steinbuch also notes that any such oath obligations should involve a discussion between the parties regarding the meaning of taking an oath and the opportunity to decline to do so, both of which appear to be lacking at most schools.<sup>157</sup>

Analyzed in terms of standard contract formation, there is neither offer nor acceptance in the professionalism oath. There is no consideration. And there is no mutual intent, because the students have no choice but to take the oath if they want to continue as students. Further, these oaths are handed down from above, and any “contract” formed would be a contract of adhesion, likely unconscionable because it “suggests an absence of meaningful choice.”<sup>158</sup>

In the language of contract theory, an academic oath is not contract as promise, because the incoming students are not permitted to dispose of their individual rights as they choose; such an oath is not, in the words of Charles Fried, “the willing invocation by a free moral agent of a convention that allows him to bind his will.”<sup>159</sup> These oaths are also not contract as consent, because there is no effective voluntary consent on the part of the students, and therefore no legally enforceable obligation.<sup>160</sup> The oaths come closest to the contract as economic efficiency, in that such an oath, at the very beginning of law school, may be a source of “welfare maximization”<sup>161</sup> because the law school receives a solemn promise from every incoming student that he or she will behave according to the norms and standards of the school; however, the welfare maximized in such cases surely leans in the direction of the law school, which drafts, demands, and receives a promise to abide by its own terms.

## 2. *Honor Codes*

Another source of agreements between law schools and students may be found in the honor codes that most law schools require their students to follow. In general, these codes “are intended to express ethical standards and do not serve merely as a list of rules and sanctions,” focusing instead on values such as honesty, integrity, and

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156. *Id.*

157. *Id.*

158. 17A AM. JUR. 2D *Contracts* § 274 (2018).

159. Fried, *supra* note 42, at 972-73.

160. See Barnett, *supra* note 39, at 300.

161. Schwartz & Scott, *supra* note 54, at 544.

fairness.<sup>162</sup> Part of the intention behind honor codes is to signal to the law student, at the earliest stage of his or her career, that the profession they are about to enter requires certain standards of action “necessary to preserve the spirit of the law and the profession.”<sup>163</sup> As such, law students “should be required to follow an honor code ‘which is representative of the ethical standards of the legal profession.’”<sup>164</sup> The hope, of course, is that by learning the professional standards expected of them, and by following these standards, law students will continue to observe professional ethics once in practice.<sup>165</sup> Some scholars emphasize that such an introduction to the ethical standards and professionalism required in legal practice must begin in law schools, which have “not just the opportunity, but arguably the responsibility, to develop attitudes and dispositions consistent with professionalism.”<sup>166</sup>

The normative goals for law school honor codes are quite broad. Scholars argue that such codes should provide, first of all, “a clear regulatory regime for safeguarding the integrity of the basic academic functions of teaching and evaluation.”<sup>167</sup> Such a regime should consist of a detailed set of rules designed to enhance equity in the evaluation and review of student work and fairness in academic competition among students.<sup>168</sup> In order to perform this role, honor codes should provide clear descriptions of impermissible conduct, enforcement procedures, and sanctions to be imposed in the event of code violations.<sup>169</sup> Considering that attending law school

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162. Kimberly C. Carlos, Comment, *The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes*, 65 UMKC L. REV. 937, 940 (1997).

163. Nicola A. Boothe-Perry, *Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 636 (2011).

164. Carlos, *supra* note 162, at 941 (quoting the student conduct code at the University of Arkansas School of Law).

165. *Id.* at 941-42; *see also id.* at 942 (“The commitment to ethics and to the professionalism that the legal profession demands should begin at the very moment law students start their legal education. This commitment to ethics in the legal profession is strengthened and enhanced by honor codes. Honor codes can be seen to serve the same function as professional ethics codes, thus creating a system of self-governance and self-regulation.”); Boothe-Perry, *supra* note 163, at 636 (“Awareness and conformance to rules and regulations governing the appropriate and acceptable scope of behavior for students pursuing law degrees will provide practice and reinforcement for professional behavior in subsequent practice.”).

166. Boothe-Perry, *supra* note 163, at 636; *see also id.* (“Throughout the tenure of a lawyer’s professional life, law schools are the singular institutions with the opportunity, the resources, the institutional capacity, and the leverage to effectuate meaningful training in professionalism. It is therefore critical that they should have the right to promulgate and administer reasonable rules and regulations to fulfill that responsibility.”).

167. Steven K. Berenson, *What Should Law School Student Conduct Codes Do?*, 38 AKRON L. REV. 803, 831 (2005).

168. *Id.* at 849.

169. *Id.*



on its own appears to have “very little impact on the moral development of law students,”<sup>170</sup> honor codes are considered by some to play a vital role in this aspect of legal training.<sup>171</sup>

Nonetheless, there are also issues with law school honor codes. For some, this sort of moral training is too little, too late for what ought to have been learned by the undergraduate level.<sup>172</sup> For example, by the time they reach law school, most students are presumably aware of and understand most of the conduct proscribed by honor codes, such as plagiarism, improper collaboration, and cheating.<sup>173</sup> On the flip side, honor codes (like all codes) are regularly accused of ambiguity, leaving students to complain that they often cannot tell whether or not they have breached the terms of the code.<sup>174</sup> A more serious pedagogical issue may be that honor codes, by emphasizing proscribed joint behavior, often discourage collaborative learning.<sup>175</sup>

Honor codes, like professionalism oaths, feature neither offer nor acceptance. No consideration exists, because there is no bargained-for performance or return promise on the part of the law school. There is no mutual intent, and therefore no contract, because honor codes are handed down from above, and would amount at most to a likely unenforceable contract of adhesion.

Like academic oaths, honor codes do not fall under the contract as promise model, because they do not allow students to promise away their rights by choice, but rather demand student acceptance of unnegotiated norms, with no reciprocal obligation on the part of the law school. For the same reason, there is no voluntary consent to the transfer of any otherwise held entitlements—in fact, consent is *required* on the part of the students if they wish to remain enrolled. As with other one-sided agreements we have examined, honor codes come closest to the efficiency model of contracts, in that students agree to abide by the law school’s honor code as a means

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170. *Id.* at 820.

171. *Id.* at 824.

172. *See, e.g., id.* at 819-20 (“[W]e would expect students at the graduate level, as a result of their greater age, educational, and life experiences, to have obtained a higher level of moral reasoning than undergraduate students. For this reason, it may be that the aspirational and educational aspects of a code of conduct are less important at the graduate level than at the undergraduate level.”).

173. *Id.* at 820.

174. Brigitte LuAnn Willauer, Comment, *The Law School Honor Code and Collaborative Learning: Can They Coexist?*, 73 UMKC L. REV. 513, 523-24 (2004) (quoting Barbara Kate Repa, *Do Honor Codes Work? Law Schools Wrestle with Crime and Punishment*, MAKING THE COMPETENT LAWYER: MODELS FOR LAW SCHOOL ACTION 33 (ABA Standing Committee on Lawyer Competence ed., 1990)).

175. Willauer, *supra* note 174, at 536-37.

of gaining from the transaction—in this case, gaining a law degree—while law schools gain a student body that promises to play by the school's rules.

### 3. *Student Handbooks*

Another source of agreements between law schools and their students is the law school student handbook or student manual. Such handbooks are prepared in order to provide information to students about the law school,<sup>176</sup> as well as establishing standards that the law school expects students to meet.<sup>177</sup> In the words of one scholar, student handbooks “are a kind of road map identifying significant informational mileposts and explaining how the institution operates.”<sup>178</sup> Whether the drafting of student handbooks and their assignment to students amounts to a contractual relationship between the student and the law school is the source of some confusion and disagreement.<sup>179</sup>

It is true that numerous cases of disciplinary process against students based on provisions of the student handbook have been litigated in U.S. courts.<sup>180</sup> Such litigation has occurred when, for example, factual situations not addressed in the handbook arise,<sup>181</sup> when procedures for addressing violations have not been followed,<sup>182</sup> when expectations are ill-defined or subject to different interpretations,<sup>183</sup> and especially when the law school attempts to alter the student's current relationship with the institution.<sup>184</sup>

As one scholar notes, “[c]ase law is replete with references to the relationship between . . . students and educational institutions as

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176. Ralph D. Mawdsley, *Litigation Involving Higher Education Employee and Student Handbooks*, 109 EDUC. L. REP. 1031, 1031 (1996).

177. *Id.*

178. *Id.*

179. *See, e.g., id.* at 1049.

180. *See, e.g.,* George L. Blum, Annotation, *Claims of Student Plagiarism and Student Claims Arising from Such Allegations*, 83 A.L.R. 6th 195 (2013).

181. Mawdsley, *supra* note 176, at 1032.

182. *Id.* (citing *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 246-47 (D. Vt. 1994) (private college ordered to reinstate or grant new hearing to student found guilty of disrespect to persons, after having been found not guilty of rape, where student had been provided notice of charge of rape, but not charge of disrespect to persons); *Kalinsky v. State Univ. of N.Y.*, 161 A.2d 1006 (N.Y. App. Div. 1990) (student denied enrollment after having been found guilty of plagiarism entitled to new hearing where neither hearing committee nor dean would reveal evidence on which they had based their decisions, a requirement in the student handbook)).

183. Mawdsley, *supra* note 176, at 1032.

184. *Id.*

contractual in nature.”<sup>185</sup> However, the question of whether a student handbook is part of that contractual relationship depends, like any contract, on the intent of the parties,<sup>186</sup> and as a general matter, “the concept of handbooks as part of a contract with commitments and expectations on both sides does not necessarily seem to have universal acceptance.”<sup>187</sup> This is especially true where, as is more and more often the case, the student handbook explicitly states that its terms do not form a contract between the student and the institution.<sup>188</sup>

Assuming, however, that the law school student handbook does set out at least part of the terms of a contract between student and law school, what kind of a contract is this? Student handbooks, like professionalism oaths and honor codes, make no provisions for offer or acceptance, meaning no mutual intent. There is also an absence of consideration, in the form of the law school’s performance or return promise to the student for his/her agreement to abide by the handbook. Further, student handbooks are crafted by one party only, with the other party handed nothing more than “an absence of meaningful choice.”<sup>189</sup>

Like the academic oaths and honor codes discussed above, student handbooks—which are not negotiated, but amount to rules handed down by the law school—lack the fundamental elements of negotiation and exchange that underlie both the promise and consent models of contract. Instead, to the extent that following the rules in the student handbook permits law students to pursue their chosen degree while authorizing law schools to regulate student behavior, the student handbook is closest to the efficiency model as, arguably, “a vehicle for maximizing individual and social gains.”<sup>190</sup>

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185. *Id.* at 1033 (citing *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979) (“This contract is conceived as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school’s disciplinary regulations, and in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof.”)); *see also* Mawdsley, *supra* note 176, at 1033 (“[L]egal actions by students against higher education institutions will generally be grounded in contract.”).

186. Mawdsley, *supra* note 176, at 1034.

187. *Id.* at 1049.

188. *See, e.g.*, Brooklyn Law School Student Handbook 2017-18, <https://blsconnect.brook-law.edu/administrative/policies/Pages/Student-Handbook.aspx> (“Although you are expected to follow the rules and policies in this Handbook, the Handbook does not form a contract of any kind.”).

189. 17A AM. JUR. 2D *Contracts* § 274 (2018).

190. Zemach & Ben-Zvi, *supra* note 39, at 201.

*D. Agreements Between Professors and Students**1. Syllabi*

The most common form of contracting between Law Professors and their students is familiar to everyone—the humble syllabus. Syllabi typically set out “the order of march for the course, including the course materials and the reading assignments for each day or week, and any assignments that have to be handed in during the semester,” as well as the nature of evaluation and the means of calculating grades.<sup>191</sup> Syllabi requirements and other elements vary from course to course and even from professor to professor teaching the same class; such differences “are generally accepted as reflecting the academic freedom and autonomy of the individual faculty member.”<sup>192</sup> The most useful syllabi will address student and professor roles and responsibilities, including expectations regarding student preparation and participation, and professor feedback and fairness.<sup>193</sup> Syllabi also address expectations and policies associated with attendance, deadlines, and academic integrity.<sup>194</sup>

The purpose of the syllabus is not only to enumerate and communicate necessary class details, but also to establish a tone for the class<sup>195</sup> and to “memorialize [course] design decisions” such as goals, class materials, assignments, teaching and learning methods, and evaluation procedures.<sup>196</sup> By plainly laying out such details, the syllabus allows both student and professor to refer back to and rely upon them throughout the course.<sup>197</sup>

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191. Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row*, 17 QUINNIPIAC L. REV. 397, 422 (1997).

192. Terrence Leas, *The Course Syllabus: Legal Status and Implications for Practitioners*, 177 EDUC. L. REP. 771, 774 (2003).

193. Gerald F. Hess, *Collaborative Course Design: Not My Course, Not Their Course, but Our Course*, 47 WASHBURN L.J. 367, 374 (2008).

194. *Id.*

195. *See id.* at 373-74 (“The syllabus is often the first contact students have with the teacher—it leaves a lasting impression. A syllabus that is clear, organized, thoughtful, comprehensive, and engaging conveys to students a model of professional thinking and performance. Conversely, a syllabus that is sloppy, disjointed, incomplete, and misleading communicates a lack of competence, respect, and professionalism.”).

196. *Id.* at 373.

197. *Id.*; *see also* Brown, *supra* note 151, at 136 (“For some professors, it seems shocking, and disrespectful, when students balk at following the rules and complain that professors impose unrealistic deadlines and penalties for failure to follow submission requirements. To curtail this type of attitude from the beginning of a professor-student relationship, syllabi should be explicit in providing context of why such rules are in place, and what aspects of professionalism they are intended to teach . . .”).

While it may seem strange at first to consider a syllabus a contract, scholars have been doing so for years.<sup>198</sup> Nor is this necessarily a negative depiction; as one scholar explains, “the syllabus should serve as a contract between teacher and students, which delineates their respective responsibilities and guides their behavior during the course.”<sup>199</sup> Nonetheless, the increasingly detailed obligations and requirements laid out in more modern syllabi can adopt some negative contractual elements such as the use of legalese, and may result in demand-oriented contracts that tend to place burdens on students.<sup>200</sup> As one writer recently put it, “[T]he notion of the syllabus as a contract has grown ever more literal, down to a proliferation of fine print and demands by some professors that students must sign and attest that they have read and understood.”<sup>201</sup>

In terms of the rules of contract formation, however, there is no room for either offer or acceptance with respect to the syllabus. Consideration is absent. Finally, there is no mutual intent, because a student has no choice but to accept and abide by the syllabus if he or she wishes to succeed in (or even pass) the class. Syllabi are by their nature handed down from above, and any contract formed would be a contract of adhesion, likely unconscionable.

Syllabi, which, as noted, are generally not subject to negotiation, also fall outside of the promise and consent models of contract in that there is no willing transfer of the student’s rights. Instead, acceptance of the requirements of the syllabus is closest to an economically efficient trade-off in which the student agrees to follow the syllabus requirements in exchange for the increased possibility of a higher grade at the end of the semester.

## 2. Course Policies

In addition to traditional syllabi, many law professors are now providing detailed course policies, spelling out and clarifying the rules and agreements governing the professor’s expectations of the

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198. See, e.g., Bateman, *supra* note 191, at 422 (“[T]he reality is that we all have a student learning contract in place by means of our course syllabi”); Kevin H. Smith, “X-File” Law School Pedagogy: Keeping the Truth Out There, 30 LOY. U. CHI. L.J. 27, 40 (1998) (“The syllabus is, in essence, a contract between you and your students.”); Jeff Todd, *Student Rights in Online Course Materials: Rethinking the Faculty/University Dynamic*, 17 ALB. L.J. SCI. & TECH. 311, 333 (2007) (“[T]he syllabus is a contract”).

199. Hess, *supra* note 193, at 374.

200. See Brian R. Gallini, *From Philly to Fayetteville: Reflections on Teaching Criminal Law in the First Year*, 83 TEMP. L. REV. 475, 489 n.23 (2011) (citing Paula Wasley, *The Syllabus Becomes a Repository of Legalese*, CHRON. HIGHER EDUC. (Mar. 14, 2008), <http://www.chronicle.com/article/The-Syllabus-Becomes-a/17723>).

201. *Id.*

students.<sup>202</sup> Such course policies contain information regarding, for example, assignments and submissions, attendance, conferences, penalties, and grading.<sup>203</sup> In addition to providing such details, course policies can in themselves be an effective pedagogical device, laying out the detailed requirements for any legal submission; as one scholar explains, such requirements “mirror court rules for written submissions, itemizing deadlines and clear standards for substantive components, formatting, citation, font, margins, line spacing, page numbering or word count, and electronic or hard-copy transmission to the grader.”<sup>204</sup>

One criticism of course policy documents is that the rules set out may be so detailed and complex that they discourage careful study by students or, worse, provide for overly harsh penalties and unrealistic expectations that students may have difficulty achieving.<sup>205</sup> Heidi Brown pushes back against such criticisms, noting that professors generally put a great deal of time and care into drafting effective course policies, with their only goal being to provide a learning experience regarding the actual procedural practice of law.<sup>206</sup>

Course policies, like syllabi, generally feature neither offer nor acceptance. Consideration is lacking. Mutual intent to contract does not exist, and there is therefore no contract, because course policies are merely handed down from above, without the benefit of negotiation,<sup>207</sup> and amount at most to a likely unenforceable contract of adhesion.

In terms of contract theory, course policies, like syllabi, do not fit within the promise or consent models of contract. Rather, they

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202. See, e.g., Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching in) A First-Year Legal Writing Program*, 29 VAL. U. L. REV. 557, 575 (1995) (“All [California Western School of Law] students receive a detailed description of course policies and procedures. . . . [These] policies are lengthy and the students are required to read them on their own. . . .”).

203. David D. Walter, *Student Evaluations - A Tool for Advancing Law Teacher Professionalism and Respect for Students*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 177, 227 n.69 (2000).

204. Brown, *supra* note 151, at 134.

205. See, e.g., Joe Patrice, *A Law Professor's Detailed, Ridiculous, Condescending "Local Rules" for Class*, ABOVE L. (Feb. 7, 2014), <http://abovethelaw.com/2014/02/a-law-professors-detailed-ridiculous-condescending-local-rules-for-class/>.

206. Brown, *supra* note 151, at 151 n.163.

207. See Leas, *supra* note 192, at 772-73 (“The department or the faculty member develops the curriculum, and the faculty member develops a course syllabus incorporating that curriculum and the rules governing the faculty member’s course. In rare cases, a faculty member will permit students to negotiate some of the elements of the course; generally, however, the faculty member dictates the substantive elements of the course and consigns the student to ‘take it or leave it.’”). This sort of top-down structure is (at least at times) in contrast with that of learning contracts; see *infra* Section II.D.3.

amount to efficiency exchanges, in which students accept the professor's demands in hopes of receiving an acceptable grade in return.

### 3. *Learning Contracts*

Another form of agreement between professor and student, albeit a much less common one, is known as the learning contract. For decades, professors have periodically attempted to work with their students at the start of the semester to negotiate a contract for the learning project on which they are preparing jointly to embark.<sup>208</sup> Some of the issues on which negotiations have centered include assignments, pacing, deadlines, the method of teaching, and even the content of the class.<sup>209</sup> Although such negotiations would seem to match up extremely well with the subject matter of the law school curriculum, apparently very few law school professors have attempted such an experiment.<sup>210</sup>

One of the main goals of the learning contract is "to encourage individualized learning by tailoring the educational experience to the objectives of individual students."<sup>211</sup> Naturally, professors may be reluctant to completely reorganize their classes on the basis of student requests; however, especially in smaller classes and seminars, professors are generally willing to consider the goals and desires of their students in designing a course significant to all parties.<sup>212</sup> A positive side effect of such negotiations is that they provide the student and the professor with opportunities to learn about each other's concerns; naturally the professor and the students may have different goals, but different students may have different goals as well.<sup>213</sup> Once such differences have been identified, negotiations may begin in earnest.<sup>214</sup>

The goals of learning contracts include: allowing students to set the proper pace for the course, providing students the opportunity to work directly with professors in the negotiation process, and cre-

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208. Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1047 (1985).

209. *See generally id.*

210. Bateman, *supra* note 191, at 421-22; *but see id.* at 422 ("In the last few years, however, interest in the use of the learning contract has increased as an option for providing appropriate supervision in law school clinical programs as well as an option for including an interactive component in student learning.").

211. Aiken et al., *supra* note 208, at 1048.

212. *Id.* at 1049.

213. *Id.* at 1048.

214. *Id.* at 1048-49.

ating a less hierarchical structure between professor and student.<sup>215</sup> But perhaps the most important goal of the learning contract is motivational, the theory being that students who are permitted to play a role in designing the course will be more invested in the learning process accompanying it.<sup>216</sup> Indeed, studies have indicated that students who negotiated and signed learning contracts “developed a greater sense of personal responsibility for acquiring and applying improved study skills” than other students.<sup>217</sup> Further, use of such contracts has led to a “level of commitment that was significantly more pronounced . . . than among previous students.”<sup>218</sup>

There are of course potential issues with the implementation of learning contracts in the law school setting. For instance, some students will always believe that it is the professor’s job to design the course, and may look upon required student involvement as undermining the integrity and seriousness of the class.<sup>219</sup> Others may be unnerved by early uncertainty regarding the structure of the course or may balk at the use of class time for negotiations rather than teaching content.<sup>220</sup> Some have warned that it is the professor’s

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215. *Id.* at 1049; see also Susan Sturm & Lani Guinier, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515, 517 (2003) (“By sharing power and encouraging experimental learning formats, I was able to create a space that opened new intellectual doors for me. Students and faculty renegotiated their relationships to each other, and through that process we each began to understand our roles as life-long learners. Teaching intellectually serious graduate students and learning from them became exciting, even fun.”).

216. Aiken et al., *supra* note 208, at 1049; see also Bateman, *supra* note 191, at 422 (“The value of a student learning contract lies in three characteristics. First, since students become more involved in their own learning and mastery of a subject, they are more motivated to learn and therefore work harder. Second, because the contract is formed with the student’s input, at least part of the course design can take into account the student’s own learning preferences and the student can learn at an individualized pace. This, of course, presents the problem of whether the student’s own perceived pace is adequate enough for course coverage. That problem, though, can be overcome through the negotiation of the contract. Third, the student learning contract changes the balance of power between student and professor, which some professors may see as an advantage, others as a distinct disadvantage.”).

217. Aiken et al., *supra* note 208, at 1049 (quoting Goldman, *Contract Teaching of Academic Skills*, 25 J. COUNSELING PSYCHOL. 320, 323 (1978)).

218. Aiken et al., *supra* note 208, at 1049 (quoting Barlow, *An Experiment with Learning Contracts*, 45 J. HIGHER EDUC. 441, 446 (1974)); see also Aiken et al., *supra* note 208, at 1050 (“Results of controlled experiments using learning contracts in various settings suggest that contracting produces benefits [including] increased study time and improved test scores . . . . The impressionistic articles in favor of learning contracts are equally positive . . .”).

219. Hess, *supra* note 193, at 377.

220. *Id.*



duty to ensure that students maintain responsibility for course design only to the extent that they are able to exercise mature judgment on such matters.<sup>221</sup>

Nonetheless, overall the literature is extremely positive regarding the results and benefits of learning contracts.<sup>222</sup> Perhaps this is not surprising, in that learning contracts, unlike virtually every agreement considered in this article—covering multiple permutations of contractual, semi-contractual, agreement-based, and exchange-related relationships in the law school context—is openly and plainly negotiated between the parties. The learning contract is the product of genuine offer and acceptance as a culmination of negotiations, amounting to mutual intent to enter the agreement. There is consideration in the form of the professor’s promise and the student’s return promise to each abide by the negotiated terms.<sup>223</sup> Thus, the learning contract is a genuine, democratically negotiated contract.

With respect to contract theory, learning contracts clearly fit within the promise model, where the student and professor, as free moral agents, promise certain actions in the course of their relationship, forming not “a communication of intention . . . [but] a commitment to a future *course of conduct*.”<sup>224</sup> Likewise, the learning contract follows the structure of the contract as consent, in that the student and the professor bring certain rights to the table and then “manifest their assent to the transfer of these rights.”<sup>225</sup> Learning contracts also follow the economic efficiency model, because the deliberate negotiation and tradeoffs between professor and student truly “facilitate the efforts of contracting parties to maximize the joint gains . . . from transactions.”<sup>226</sup> Indeed, of all the contracts, semi-contracts, agreements, and exchanges governing relationships in the law school context, only one—the learning contract—appears to fit within all three theories of contract. Learning contracts are

221. MARYELLEN WEIMER, LEARNER-CENTERED TEACHING: FIVE KEY CHANGES TO PRACTICE 43 (2002).

222. See, e.g., Aiken et al., *supra* note 208, at 1090 (“We . . . know that our methodology, part of which involves using learning contracts through which we divest ourselves of some of our power, is well received by most of our students. It inspires many of them to realize that they can make intelligent decisions about what and how to learn, in law school and thereafter. We have seen students balk at accepting responsibility, identify their fears, and overcome them.”).

223. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (“To constitute consideration . . . a return promise must be bargained for. . . . [A] return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”).

224. Michigan Law Review Association, *supra* note 40, at 905.

225. Barnett, *supra* note 39, at 319.

226. Schwartz & Scott, *supra* note 54, at 544.

thus discernibly the most fairly negotiated and democratic contractual relationships in the law school universe. As such, they are, at the very least, deserving of further study.<sup>227</sup>

### III. CONCLUSION

This article considers the various agreements, exchanges, contracts of adhesion, and genuine contracts that underlie the functioning of the law school as an organization. We have considered and analyzed agreements between the federal government and the ABA and the law schools they regulate, between law schools and professors, between law schools and students, and finally between professors and students.

Some of these agreements lack any negotiating power on the part of one party—including learning accommodations under the ADA and the ABA’s learning outcome and active learning requirements. Such agreements lack offer and acceptance and mutuality of intent, as well as consideration, and therefore are, at best, contracts of adhesion, likely unconscionable because they suggest “an absence of meaningful choice.”<sup>228</sup> These agreements also reflect none of the elements of contract under the promise, consent, or efficiency theories because they are not really contracts at all, but regulations handed down from above.

Law professors’ at-will employment agreements, while incorporating the required elements of contract formation—namely offer, acceptance, consideration, and mutual intent—fail to amount to genuine contracts due to their at-will nature. Because an at-will employee “simply has no legally protected interest in his or her employment,”<sup>229</sup> such agreements cannot be seen as contracts because neither party must abide by them. Short-term and long-term contracts, as well as tenure agreements, also feature the required contract elements, but fail to amount to genuine contracts because they protect only the professor (to varying extents), and not the law school, thus demonstrating a distinct lack of mutuality.<sup>230</sup> In terms of contract theory, law professor employment agreements do reflect the promise theory, but only in a single direction. That is, most law professor contracts reflect an employment promise on the part of the law school but no return promise on the part of the professor. In addition, such agreements are generally not contracts of consent

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227. The author of this article is currently at work on such a study, entitled: *A Meeting of the Minds: The Promise of the Learning Contract in Law School Pedagogy*.

228. 17A AM. JUR. 2D *Contracts* § 274 (2018).

229. 27 AM. JUR. 2D *Employment Relationship* § 9 (2018).

230. See 19 WILLISTON ON CONTRACTS § 54:39 (4th ed. 2018).

(as understood in contract theory) because there is no transfer of rights from the professor to the law school. Rather, the professor retains his or her rights, including the right to quit and take up different employment at any time. Law professor contracts do generally reflect the economic efficiency theory, in that law schools offer and professors accept only what is needed to bring the parties to agreement, thus “maximizing individual and social gains.”<sup>231</sup> However, this is not sufficient to transform such agreements into genuine contracts.

With many other agreements examined here, including academic oaths, honor codes, student handbooks, syllabi, and course policies, one party has such a dominant position in the negotiations that the resulting agreements cannot be said to include either offer or acceptance. Consideration too is absent. Mutual intent to contract does not exist, and therefore there can be no contract, because such “agreements” are handed down from above,<sup>232</sup> and amount, at most, to unenforceable contracts of adhesion due to “an absence of meaningful choice.”<sup>233</sup> These agreements fail to reflect the promise theory, which allows a “free moral agent . . . to bind his will,”<sup>234</sup> and the consent theory, which demands “the valid transfer of entitlements” based on the parties’ original voluntary consent.<sup>235</sup> In such cases, the resulting exchanges at best “maximize the joint gains . . . from transactions,”<sup>236</sup> reflecting the economic efficiency theory of contract.

In point of fact, the only contract in the law school context that appears to reflect the democratic negotiations of independent parties is the so-called learning contract. These contracts feature genuine offer, acceptance, mutuality of intent, and consideration in the form of exchanged promises. Learning contracts accurately demonstrate the promise theory in that they reflect “the willing invocation by a free moral agent of a convention that allows him to bind his will.”<sup>237</sup> They further reflect the consent theory in that they result from “the valid transfer of entitlements” based on the parties’ original voluntary consent.<sup>238</sup> Finally, learning contracts also demonstrate economic efficiency in that their democratic negotiation and

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231. Zemach & Ben-Zvi, *supra* note 39, at 201.

232. See Leas, *supra* note 192, at 772-73.

233. 17A AM. JUR. 2D *Contracts* § 274 (2018).

234. Fried, *supra* note 42, at 972-73.

235. Barnett, *supra* note 39, at 297.

236. Schwartz & Scott, *supra* note 54, at 544.

237. Fried, *supra* note 42, at 972-73.

238. Barnett, *supra* note 39, at 297.

rough equality of bargaining power represent “a vehicle for maximizing individual and social gains.”<sup>239</sup>

At any time, but particularly in these days of increasing antidemocratic sentiment in the United States and abroad, such fairness of bargaining power and the genuine contracts that result are perhaps what the legal academy should aim for in governing its own affairs.

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239. Zemach & Ben-Zvi, *supra* note 39, at 201.

# Office Hours Are Not Obsolete: Fostering Learning through One-on-One Student Meetings

DeShun Harris\*

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Office hours, whether it is the traditional notion of an office hour whereby the professor has designated times for students to visit, office hours by appointment, or an open door policy, are a great learning opportunity for students.<sup>1</sup> In the law school context, the American Bar Association (ABA) requires full-time faculty members to “[be] available for student consultation about those classes” they teach.<sup>2</sup> In addition to office hours, students meet one-on-one with faculty in a variety of ways: mentoring, advocacy coaching, answering substantive questions, legal writing conferences, law review note advising, career/academic support counseling, and for so many other purposes.<sup>3</sup> Indeed, law students reported on the Law

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1. Jacqueline Lipton, *Office Hours* . . . , FAC. LOUNGE (Oct. 8, 2015, 9:53 AM), <http://www.thefacultylounge.org/2015/10/office-hours-.html>.

2. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017 404(a)(1) (2016), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_aba\\_standards\\_and\\_rules\\_of\\_procedure.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf).

3. See Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards A Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 262 (2004) (arguing that understanding the one-on-one meeting is instructive to various professor-student meetings).

School Survey of Student Engagement (LSSSE), that most students have worked with faculty on activities other than coursework.<sup>4</sup>

In evaluating the literature on teaching and learning, a great deal is written about the classroom, but what about the teaching and learning that can, and does, occur during office hours? Given the many instances during which students and faculty interact on a one-on-one basis, the limited literature on office hours in law school should be expanded to ensure we create the best learning from these instances.<sup>5</sup> Legal educators may have numerous reasons for not exploring the one-on-one dynamics of office hours. A dominate reason for not investigating office hours may come down to one's issue with the words "office hour." For example, one might consider that being required to be present at a set location, day(s), and time(s) is useless in today's world.<sup>6</sup> Indeed, because office hours are often underutilized by students, some researchers argue that underutilization of office hours is a sign that the traditional form of in-person office hours "is made obsolete by the pervasiveness of more convenient and instantaneous ways of communication."<sup>7</sup> Support for this argument is students' increasing inclination for technology and their reliance on communicating by e-mail rather than visiting office hours.<sup>8</sup> If office hours are conceptualized by a law school as a distinct location and time, the students may perceive office hour visits as less worth the effort when compared to the convenient and instantaneous e-mail.

Other arguments why legal educators have not explored the office hour might include arguing the ABA's requirement to be "available" does not mean one must hold office hours.<sup>9</sup> Another reason to not

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4. See LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LOOKING AHEAD: ASSESSMENT IN LEGAL EDUCATION ANNUAL RESULTS 2014 9, [http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE\\_2014\\_AnnualReport.pdf](http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE_2014_AnnualReport.pdf) (stating 44% of students indicated they "never worked with faculty members on activities other than coursework," which allows one to infer that 56% have).

5. See Wellford-Slocum, *supra* note 3, at 257.

6. See Jonathan Rees, *Office Hours are Obsolete*, CHRONICLEVITAE (June 6, 2014), <https://chroniclevitae.com/news/534-office-hours-are-obsolete>; see also Margaret Smith et al., *"Office Hours are Kind of Weird": Reclaiming a Resource to Foster Student-Faculty Interaction*, 12 INSIGHT: A J. SCHOLARLY TEACHING 14, 21 (2017).

7. Smith et al., *supra* note 6 (arguing that while the authors are not supporting the abolishment of office hours, the traditional form of office hours of come in person "is made obsolete by the pervasiveness of more convenient and instantaneous ways of communication," so the solution is to create more diverse ways to engage).

8. Mario Guerrero & Alisa Beth Rod, *Engaging in Office Hours: A Study of Student-Faculty Interaction and Academic Performance*, 9 J. POL. SCI. EDUC. 403, 406 (2013); see also Lei Li and Jennifer P. Pitts, *Does it Really Matter? Using Virtual Office Hours to Enhance Student-Faculty Interaction*, 20 J. INFO. SYS. EDUC. 175, 181 (2009).

9. See Lipton, *supra* note 1 (commentary by David Tokaz saying, "[d]idn't see any specific requirements for office hours, just that general requirement that you be available").

investigate office hours may be that for some faculty members, students frequently do not use their office hours.<sup>10</sup> Other faculty members may not have the issue of infrequently used office hours particularly if students are required to meet with them as may be the case with legal writing or academic support faculty. It is possible that faculty use their experiences in practice (i.e., meeting with clients) to navigate one-on-one student meetings which may lead to less of a perceived need to research best methods for these meetings. And perhaps, as is true in the undergraduate context, both students and faculty members may view the office hour negatively.<sup>11</sup> This negative perception may be particularly true if the one-on-one meeting has the potential to shift the power dynamic whereby the expert teacher is faced with being vulnerable in addressing a topic that they are not well-versed on or engaging with a student who wants justification for a poor grade they received on an exam.<sup>12</sup> Faculty negative perception of office hours may be further derived from the view that underutilization of office hours is an inefficient use of time.<sup>13</sup> Or the student perception may be that office hours are only for those who struggle,<sup>14</sup> or they may believe the use of office hours is an imposition on the professor's time.<sup>15</sup> The importance of the one-on-one meetings then may be overshadowed by other demands to publish, present, teach, and serve.<sup>16</sup>

Notwithstanding these reasons, the one-on-one meeting is important because research indicates that it is an important learning environment for students.<sup>17</sup> Engaging with students one-on-one has the benefit of giving students the opportunity to practice lawyering skills such as formulating questions and advocating.<sup>18</sup> Office hours, at least in the undergraduate context, have a positive correlation with grades, which indicates there are tangible benefits to meeting one-on-one between student and faculty.<sup>19</sup> If this is true in

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10. See Maryellen Weimer, *Why Students Don't Attend Office Hours*, FAC. FOCUS (Jan. 21, 2015), <http://www.facultyfocus.com/articles/teaching-professor-blog/students-dont-attend-office-hours/> (revealing a survey of 600 undergraduate students showing that 66% of them did not attend office hours for a course they were surveyed on).

11. Guerrero & Rod, *supra* note 8, at 404.

12. Philip C. Kissam, *Conferring with Students*, 65 UMKC L. REV. 917, 924 (1996).

13. Guerrero & Rod, *supra* note 8.

14. See Smith et al., *supra* note 6, at 15 (revealing their study shows that students see office hours as a "last resort they can turn to when an academic crisis" is possible).

15. Guerrero & Rod, *supra* note 8, at 405-06.

16. Wellford-Slocum, *supra* note 3, at 272.

17. See Whitney Griffin et al., *Starting the Conversation: An Exploratory Study of Factors That Influence Student Office Hour Use*, 62 C. TEACHING 94, 94 (2014).

18. Lydia Eckstein Jackson & Aimee Knupsky, "Weaning off of Email": *Encouraging Students to Use Office Hours over Email to Contact Professors*, 63 C. TEACHING 183, 183 (2015).

19. Guerrero & Rod, *supra* note 8, at 411.

the law school context, then it may be a means for law professors to see improved final exams, making their grading easier.<sup>20</sup> Thus, for purposes of ensuring that our students are able to learn from this experience, legal educators should investigate the best practices for conducting one-on-one meetings, which includes the office hour.

Because for some faculty members the office hour is not used very often by students, this paper will briefly discuss the impediments to students' use of office hours and how to overcome them, including nontraditional methods for meeting and why e-mail may not be an adequate substitute. Then this paper will focus on the office setting and how to make sure it communicates to students a welcoming environment. Next, this paper will address how to effectively navigate through an office hour by using the latest research on the office hour. Finally, this paper will discuss how to create an environment that is best for learning. In particular, general guidelines for ensuring that students have the best chance for digesting the information exchanged in the meeting.

## I. OVERCOMING UNDERUTILIZATION OF OFFICE HOURS

One significant factor that may contribute to students not using office hours is institutional norms.<sup>21</sup> Research in the undergraduate context indicates institutional norms have an impact on whether students engaged with faculty.<sup>22</sup> It is possible too within the law school context that students' awareness of norms that encourage or inhibit one-on-one interaction may also be a factor. This is further ingrained in instances where students perceive their professors as physically unavailable or seemingly uninterested.<sup>23</sup> They are unlikely to visit if they fear appearing incompetent or taking up a professor's time.<sup>24</sup> And finally, law schools encourage students to be busy studying and seeking out opportunities for professional

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20. See LINDA B. NILSON, *TEACHING AT ITS BEST: A RESEARCH-BASED RESOURCE FOR COLLEGE INSTRUCTORS* 53 (3d ed. 2014), [https://www.pharmacy.cmu.ac.th/unit/unit\\_files/files\\_download/2014-05-02Teaching-at-its-best.pdf](https://www.pharmacy.cmu.ac.th/unit/unit_files/files_download/2014-05-02Teaching-at-its-best.pdf).

21. Griffin et al., *supra* note 17, at 95; see also Elin Meyers Hoffman, *Faculty and Student Relationships: Context Matters*, 62 C. TEACHING 13, 14 (2014) (arguing that institutional norms can also impact faculty engagement with students if they are pressured to research).

22. Griffin et al., *supra* note 17, at 95.

23. See Lauren Howard, *Building Relationships with Professors: Easier Advised than Done*, MS. JD (Sept. 30, 2008), <http://ms-jd.org/blog/article/building-relationships-professors-easier-advised-done>.

24. See Guerrero & Rod, *supra* note 8, at 405; see also Weimer, *supra* note 10.



growth like internships, law review activities, or advocacy competitions, which may leave them with less time to consult with professors during office hours.<sup>25</sup>

The identity of a student can impact the likelihood that a student will visit office hours.<sup>26</sup> Students may not visit office hours of a professor whose “social and physical identities” differ from their own, as students whose identities are similar to a majority of professors are generally more satisfied with their faculty interactions.<sup>27</sup> At one law school, gender had an impact on the use of office hours; men were more likely to visit the office hours than women.<sup>28</sup> Further, the office hour has the potential to interfere with students’ professional identities in that many students carry an often false identity of perfection.<sup>29</sup> Attending office hours for the purpose of clarifying creates a risk to upending this identity.<sup>30</sup> Identity triggers can feed into what is a well-known phenomenon that students avoid office hours because they are intimidated.<sup>31</sup>

Finally, it is important to identify who may be the least likely to use office hours: academically at-risk students, the students you need to reach the most.<sup>32</sup> Research among undergraduate students indicates that students who expect to receive low grades are less likely to seek help.<sup>33</sup> These struggling students also believe they lack competence.<sup>34</sup> While undergraduate students who expect low grades and feel incompetent may fail to seek help because of a belief of imminent failure, law students may fail to seek help and resolve to “ride” the curve.<sup>35</sup>

While a professor may have no control over these factors, there are some strategies she may employ that can help encourage students to attend office hours. In particular, the professor must advocate for students’ use of office hours and send the message that office hours can be used to assist students to “think critically during

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25. Kissam, *supra* note 12, at 920.

26. Griffin et al., *supra* note 17, at 95.

27. *Id.*

28. Ruth Anne French-Hodson, *The Continuing Gender Gap in Legal Education*, 61 FED. LAW. 80, 85 (2014).

29. Kissam, *supra* note 12, at 923.

30. *Id.*

31. See Howard, *supra* note 23; see also Elie Mystal, *How Not to Use Office Hours*, ABOVE L. (Oct. 6, 2016, 2:01 PM), <http://abovethelaw.com/2016/10/how-not-to-use-office-hours/>.

32. Guerrero & Rod, *supra* note 8.

33. Carl Chung & Leon Hsu, *Encouraging Students to Seek Help: Supplementing Office Hours with a Course Center*, 54 C. TEACHING 253, 253 (2006); but see Guerrero & Rod, *supra* note 8, at 405 (noting that top performing students in the undergraduate context also tend to seek help less).

34. Guerrero & Rod, *supra* note 8.

35. See *id.*

office hours in a capacity that lecture cannot provide.”<sup>36</sup> To increase the likelihood students will engage with a professor one-on-one, professors may consider several options. While use of one of these options is unlikely to yield an influx of students, either of these options may be helpful in reaching those populations that may feel excluded or need help the most.<sup>37</sup>

Students attend office hours more often for those professors whose feedback was perceived as more helpful.<sup>38</sup> In increasing office hours use generally, a greater effect on students’ use of office hours is related to the utility of the professor’s feedback.<sup>39</sup> As a result, professors who are able to provide meaningful feedback to students in class or on assignments may see growth in the use of their office hours;<sup>40</sup> indeed from the research it appears that feedback was a greater indication of use of office hours than even “perfecting [the] atmosphere.”<sup>41</sup>

If a faculty member is looking to overcome norms such as the perception that they are unavailable or uninterested, then the professor may consider extending an explicit invitation to office hours to the entire class. It can also serve as an overt attempt to be inclusive to those students who may not attend because their identity is different from the instructor’s. An explicit invitation has the benefit of increasing their approachability, by inviting students to engage with them outside of the classroom.<sup>42</sup> Further, an explicit invitation has been shown to have a greater impact on approachability than the use of pedagogical practices in the classroom.<sup>43</sup>

Explicitly inviting students to office hours may take several forms. First, professors should consider the language related to office hours in their syllabus. Simply listing the days and times they are available for office hours may be insufficient to encourage students to attend, but if they explicitly offer help during these days and times and invite students to come, then they may find students more willing to engage.<sup>44</sup> Second, professors should consider adding

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36. *Id.*

37. Griffin et al., *supra* note 17, at 95.

38. *Id.* at 98.

39. *Id.*

40. SUSAN AMBROSE ET AL., HOW LEARNING WORKS: 7 RESEARCH-BASED PRINCIPLES FOR SMART TEACHING 148-52 (John Wiley & Sons, Inc. 2010) (providing a means to provide feedback even in group settings).

41. Griffin et al., *supra* note 17, at 98.

42. *Id.* at 95.

43. *Id.*

44. NILSON, *supra* note 20, at 91; *see also* Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 382 (2001) (providing an example syllabus with office hour language).

a conversation regarding office hours to their first day discussion and refer to office hours again near any dates of assignments, midterms, or finals.<sup>45</sup> For example, a first day discussion may include an invitation to all students to visit the professor's office over the first two weeks of class to introduce themselves.<sup>46</sup> An explicit invitation might be coupled with e-mail reminders. E-mailing a reminder about office hours is an effective way to increase office hours attendance.<sup>47</sup> One study found it led to an increase of up to thirty-two percent.<sup>48</sup> These efforts not only require minimal effort, but can lead to successfully increasing the attendance at office hours.<sup>49</sup>

In considering an explicit invitation, professors should think about explaining how office hours may be used. In explaining how office hours may be used, professors equip students with an understanding of who office hours are designed for and what purposes are useful during this time. In particular, professors can explain away misperceptions that office hours are only for those poor performing students to seek help, while also emphasizing that it is a way to clarify confusion.<sup>50</sup> One might explain that office hours are a form of professional development; a way for students to learn how to engage with members of the legal profession and encourage students to prepare for these meetings accordingly.<sup>51</sup> A professor may further explain that office hours can be used to help students strengthen their analytical skills, to answer questions, and to help them clarify their own thinking and find a way to move productively.<sup>52</sup> Further, one might explain that office hours can be used to explore more about the legal profession and discuss their interests in law.<sup>53</sup>

Further, to accommodate busy law students, it might be helpful to consider the timing of office hours to accommodate the students'

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45. NILSON, *supra* note 20, at 91.

46. MICHAEL HUNTER SCHWARTZ ET AL., WHAT THE BEST LAW TEACHERS DO 76-77 (Harvard Univ. Press 2013).

47. Guerrero & Rod, *supra* note 8, at 407.

48. *Id.*

49. *Id.* at 413.

50. *Id.*; see also Hoffman, *supra* note 21, at 15 (stating at the undergraduate level that some one-third of students have little to no engagement with their professor outside of class and some are unable to articulate a reason to visit).

51. See Kissam, *supra* note 12, at 919 (arguing that if one-on-one meetings were purposely engaged in individual instruction and mentoring, they could serve as a means to assist students in developing engagement similar to that between young and senior attorneys).

52. Schwartz, *supra* note 44, at 403-04.

53. Richard Freishtat, *Don't Be Alone During Office Hours: Tomorrow's Teaching and Learning*, TOMORROW'S PROFESSOR POSTINGS (Jan. 10, 2017), <https://tomprof.stanford.edu/posting/1570>.

schedules.<sup>54</sup> For example, before setting one's office hours, one might consider polling students for times that are convenient for them.<sup>55</sup> Additionally, to help students overcome the belief that they are imposing on one's time, particularly if one has an open-door policy or appointment only policy, one might use an online scheduling tool to make one's office hours more accessible.<sup>56</sup>

In reaching those students who may avoid attending office hours because of identity or who are low performing academically, it may be helpful to reframe office hours or offer supplemental hours. For example, in the undergraduate context, framing office hours as tutoring has proven effective in increasing the frequency at which students attend office hours, even when the content was the same as it would have been during normal office hours.<sup>57</sup> One method to reframe office hours as tutoring is to host the tutoring sessions two hours every other week and allow students to attend the tutoring sessions individually or in a group.<sup>58</sup> In the law school context, the term "tutor" may come with a stigma so one may reframe office hours as "mentoring." During office hours or other one-on-one meetings, avoid engaging in traditional "tutoring"— simply telling students the answers or imparting quick "tricks"— because tutoring interferes with the self-regulation process (the process of planning, monitoring, and evaluating one's learning<sup>59</sup>) and students will simply wait for answers instead of engaging with the materials themselves.<sup>60</sup>

One way of supplementing office hours which may result in an increase in student attendance is to create a course center.<sup>61</sup> In one study, one to four course centers were held each week and were held

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54. Guerrero & Rod, *supra* note 8, at 413 (finding that 36% of surveyed students indicated they did not attend office hours because of scheduling).

55. See Griffin et al., *supra* note 17, at 98; Margaret Walsh, *How to Make the Most of Your Office Hours*, FAC. FOCUS (Dec. 9, 2011), <https://www.facultyfocus.com/articles/teaching-and-learning/how-to-make-the-most-of-your-office-hours/>; see also NILSON, *supra* note 20, at 90.

56. Guerrero & Rod, *supra* note 8, at 413 (noting online scheduling tools can be used for more convenient time); see also Kissam, *supra* note 12, at 927 (stating in scheduling office hours both parties can be committed to "full consideration and discussion of the relevant subjects"). Example scheduling tools include You Can Book Me at <https://youcanbook.me> or Calendly at <https://calendly.com>.

57. Amanda Joyce, *Framing Office Hours as Tutoring*, 65 C. TEACHING 92, 92 (2017).

58. *Id.*

59. See LINDA B. NILSON, *CREATING SELF-REGULATED LEARNERS* 8 (Stylus Publishing 2013).

60. See Louis N. Schulze, Jr., *Using Science to Build Better Learners: One School's Successful Efforts to Raise Its Bar Passage Rates in an Era of Decline*, 12 FLA. INT'L L. REV. (forthcoming) (manuscript at 12) (available at <https://ssrn.com/abstract=2960192>).

61. Chung & Hsu, *supra* note 33, at 255.

for one to two hours.<sup>62</sup> The course centers were reserved classrooms where students were allowed to come and go and they initiated contact with the professor or teaching assistant.<sup>63</sup> The freedom of this course center allowed students to come equipped with questions, work with peers, or just sit in the room to work alone.<sup>64</sup> The popularity of the course center included its perceived convenience over office hours, the ability to receive one-on-one assistance, and group work.<sup>65</sup> This framework is not too different from review sessions held by professors before or after an exam, but instead of the professor standing at a podium and guiding instruction, the professor is seated and awaits students to independently raise questions in a conversational (as opposed to lecture) setting.

While tutoring sessions or a course center may not be an option for some professors, it is helpful to note that these informal structures were effective in getting students to attend even though they could have gotten the same benefits in a one-on-one traditional office hour.<sup>66</sup> In addition to informal structures, professors may consider informal locations outside of their actual office.<sup>67</sup> The formal structure of an office can be intimidating or less accessible for students, particularly if they are housed in areas that students do not commonly trek or if they are “guarded” by administrative staff.<sup>68</sup> Making use of student common areas such as the library, dining area, or student lounge can be an optimal space to hold office hours.<sup>69</sup> Further, it can be useful in breaking down barriers.<sup>70</sup>

One place that professors may turn to instead of holding physical office hours with students is e-mail.<sup>71</sup> It is important to note that while using e-mail for office hours may be a way to engage with students who may not otherwise be willing or able to visit one’s physical office hours, using e-mail for office hours has some distinct

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62. *Id.* at 254.

63. *Id.*

64. *Id.*

65. *Id.* at 256.

66. See Chung & Hsu, *supra* note 33, at 257 (stating “a course center can do as good or a better job of delivering help and of motivating students to seek that help); see also Joyce, *supra* note 57 (stating “[d]espite this similarity, students attend tutoring twice as frequently as office hours . . .”).

67. Kissam, *supra* note 12, at 927.

68. *Id.* at 921.

69. Jackson & Knupsky, *supra* note 18; Elaine S. Barry, *Using Office Hours Effectively*, ASS’N FOR PSYCHOL. SCI. (June 1, 2008), <https://www.psychologicalscience.org/observer/using-office-hours-effectively>; but see Hoffman, *supra* note 21, at 16 (listing that meeting with professors at a bar or party in addition to other boundaries that students thought were not acceptable).

70. See Barry, *supra* note 69.

71. *Id.*

disadvantages.<sup>72</sup> In particular, e-mail can sometimes include unfavorable biases against women and minorities.<sup>73</sup> Additionally, the influx of e-mail to the professor can actually increase one's workload in responding.<sup>74</sup> If one is going to use e-mail for meeting with students, it is important to consider implementing policies that explain appropriate times and functions for e-mail.<sup>75</sup> For example, one may explain to students that e-mails received during business hours will receive a response within a certain time period (e.g., one to two days) or e-mails received during weekends or after hours will be treated as being received on the next business day. This will limit one's need to feel pressured in making an immediate response and set expectations with students. For the function of e-mail, one might explain that e-mail is most suitable to questions about when assignments are due or clarifications of the syllabus, but it is not appropriate to discuss grades or to clarify doctrine, as those topics are better suited for a face-to-face or phone conversation.

Another tool that should be treated similar to e-mail is instant messenger (IM). IM has similar issues as e-mail, given that one's inability to read verbal cues such as tone can lead to miscommunications.<sup>76</sup> Yet offering it as a supplement to in person office hours generally makes students feel the professor is more accessible; although, offering it may not translate into a great use by the students.<sup>77</sup> A better option to e-mail or IM may be a traditional phone call or video conferencing through use of Zoom, Skype, Google Hangouts, or other platforms to avoid the pitfalls that may accompany e-mails and IM.<sup>78</sup>

From the research, it appears that professors have the burden of enticing students to visit office hours. Creating a supportive space for students outside of the classroom is important to the academic and professional development of law students, and the office hour is a means for building relationships with students to assist them in their development.<sup>79</sup> Once attention has been given to getting students into one's office hours, the next step is to consider how to create an office setting that is inviting and conducive to learning.

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72. *Id.*; see also Jackson & Knupsky, *supra* note 18.

73. Jackson & Knupsky, *supra* note 18.

74. *Id.*

75. *Id.*

76. Li & Pitts, *supra* note 8, at 177.

77. *Id.* at 177, 181; see also *id.* at 179 (finding that in studying the offering of IM, 85.4% of students indicated a desire to have virtual office hours).

78. Jackson & Knupsky, *supra* note 18.

79. Hoffman, *supra* note 21, at 18.

## II. CREATING A WELCOMING OFFICE SETTING

In considering one's office setting, it is important to consider students' experiences both inside and outside of one's office. In regard to what is outside of one's office, consider where students tend to congregate in the event that they must wait to see you. If students wait directly outside of one's door, one might consider if this creates privacy issues for the students who are seated inside of one's office.<sup>80</sup> Additionally, if one must leave the office during one's posted office hours, consider ways that one can signal to students that one will return: a posted sign explaining the absence, a sign indicating return time, or a note with support staff.<sup>81</sup> While most faculty members are present during their office hours, if a student has had an experience in attempting to see a professor during office hours only to find them absent, one's own unexplained—even brief—absence may be wrongly interpreted as another unavailable professor and feed a cycle of underutilization of office hours.<sup>82</sup>

In thinking about the inside of one's physical office space, it is important to consider one's office setting.<sup>83</sup> It is very important to consider the appearance and structure of one's office and the nonverbal signals it may send to visiting students.<sup>84</sup> Nonverbal communication is important in any context, and one's office space communicates a message to students.<sup>85</sup> If one's office is disorganized or one's desk is covered in papers, one may be communicating to students that one is unavailable.<sup>86</sup> Further, if one fails to minimize the computer screen, it may communicate to the student that they are an interruption.<sup>87</sup> Thus, to the extent possible, consider how one can create an inviting space that minimizes the clutter and distractions by silencing one's cell phone or minimizing one's screen. In addition to the conditions of one's office space, consider the arrangement of one's office furniture. If one has a large desk that is positioned between one and the student, consider closing that space.<sup>88</sup>

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80. But see Kim Knowles-Yanez, *Rethinking Office Hours*, THRIVING IN ACADEME 5, 9 (2016) (stating that with matters of general concern you might raise your voice so other students may hear to save time repeating the same thing to multiple students).

81. Rory A. Pfund et al., *Is the Professor In? Faculty Presence During Office Hours*, 47 C. STUDENT J. 524, 527 (2013).

82. *Id.*

83. See Rosemarie Arbur, *The Student-Teacher Conference*, 28 C. COMPOSITION & COMM. 338, 338-39 (1977) (discussing the nonverbal message that the desk can send and offering the best arrangement for a meeting).

84. *Id.* at 339.

85. *Id.* at 338-39.

86. Kissam, *supra* note 12, at 921.

87. *Id.*

88. *Id.*; see also Arbur, *supra* note 83.

This may mean moving from one's chair to one next to the student or it may mean, if one has space, sitting at a small table. Realigning with the student creates the nonverbal message that in one's office one is consciously minimizing the barriers between student and professor that often exist in the classroom space.<sup>89</sup>

### III. THE COMMON OFFICE HOUR FRAMEWORK

In conducting a one-on-one meeting with students, it is important to understand the framework an office hour may take. In evaluating the structure of office hours, past research looked to other disciplines such as social work as a model for how one might conduct the office hour.<sup>90</sup> In the limited research written in the context of law school, the research investigated what occurred or generally occurs within meetings between law students and professors, and often relied on personal experience or reflected the impact of utilizing counseling or other models in office hours.<sup>91</sup> Yet, research in the law school context is still needed to extensively study what actually occurs in office hours, and it should be evaluated across law schools with various legal educators.<sup>92</sup>

Additionally, a more recent extensive study that included taping the exchanges of twenty one-on-one interactions during office hours across two German universities gives a view into what such studies in the law school context might yield.<sup>93</sup> From the German study, a framework for "academic discourse" emerges.<sup>94</sup> Limberg, the author of the German study, concluded that most one-on-one conferences take on a five-sequenced framework: prefacing sequence, identification sequence, outlining academic business, negotiation of academic business, and closing sequence.<sup>95</sup> The research available on conducting office hours makes it clear that the sequences of the one-on-one conference can be thought of as cyclical or at times some sections may merge.<sup>96</sup> Further, because most conversations in law school office hours tend to be very complex, sequencing through the

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89. Arbur, *supra* note 83.

90. See generally *id.*; see also Wellford-Slocum, *supra* note 3, at 299-300.

91. Wellford-Slocum, *supra* note 3, at 299-300.

92. But see *id.* at 275-76 (stating the author's observations from recording herself and colleagues, but the call here is for more of a systematic approach as that found by Holger Limberg). "Legal educators" include, but are not limited to, professors, academic support/career services/student services professionals, and various deans.

93. Holger Limberg, *Discourse Structure of Academic Talk in University Office Hour Interactions*, 9 DISCOURSE STUD. 176, 177-78 (2007).

94. *Id.* at 177.

95. Limberg, *supra* note 93, at 188-89.

96. Wellford-Slocum, *supra* note 3, at 300.



office hour will likely be fluid, as more complex matters will lead the professor and student in and out of the sequences.<sup>97</sup> Understanding the five-sequenced structure is helpful in navigating the office hour meeting, particularly because it provides insight into when a meeting might prove fruitful.

### A. *First Sequence*

The prefacing sequence will begin the office hour with an initiation of the meeting.<sup>98</sup> A summons can begin the meeting; for example, the professor may personally invite the student to office hours or the student may signal by knocking or speaking at the professor's door that they are prepared to enter the professor's office.<sup>99</sup> The result of this summons is an answer generally by the professor who may then invite the student in, perhaps by saying "Please come in" or acknowledging the student's presence at the door.<sup>100</sup> To ensure that the start of the meeting runs smoothly, it is important to consider how one can best facilitate the initiation of the meeting.

If the meeting occurs by a personal invitation (in contrast to a class-wide invitation) one extends to the student, it is best to consider how to avoid creating a threat in the mind of the student.<sup>101</sup> Saying or writing the words (or something similarly vague) "Please stop by my office" without context is likely to make the student feel that one's conversation is going to be unpleasant.<sup>102</sup> Instead, consider giving the student some context. For example, "Jill, you have been doing an excellent job in my class. I'd like to talk to you about your career plans." or "Joe, on the midterm, you struggled with crafting clear and concise rule statements. I'd like to work with you on developing this skill. Are you free to meet with me Thursday at 1:00 pm?" Giving the student context regarding what one's meeting is about prepares the student for one's future engagement without creating a threatening situation.<sup>103</sup> Additionally, it makes one appear more approachable.<sup>104</sup> Making conscious decisions on how one invites students into one's space sets the tone for what will follow.

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97. Limberg, *supra* note 93, at 189.

98. *Id.* at 182.

99. *Id.*

100. *Id.*

101. See Arbur, *supra* note 83, at 338.

102. *Id.*

103. *Id.*

104. See *id.* (stating, "one aspect of engagement is amiability of the sort that dispels the image of teacher as Draconian judge").

## B. *Second Sequence*

The second sequence is the identification sequence that is generally the opening of the meeting.<sup>105</sup> Identification in this context is the identification of the student by name or face, and it may occur from seeing the student, or it may come from a student's self-introduction.<sup>106</sup> Oftentimes, if the student is part of a large class, the student may provide their name.<sup>107</sup> If the student is not forthcoming about their name, the professor may ask for other information that may trigger the name or ask directly.<sup>108</sup>

Further, this part of the meeting often has a greeting of some kind.<sup>109</sup> Identification and greeting may occur simultaneously.<sup>110</sup> This sequence can serve a couple of functions: one to allow parties to settle and to formalize the academic meeting.<sup>111</sup> The greeting serves as a demarcation between one's meeting in a private, pleasant experience and the classroom which may be more rigid with a set agenda.<sup>112</sup> Thus, greetings are an important part of the meeting experience that should not be overlooked.<sup>113</sup> This is particularly true if the professor does not know the student's name, as the greeting can serve as a mutual recognition which will allow the professor to draw on previous interactions that might indicate the reason for the visit.<sup>114</sup>

However, one may skip the greeting to get to matters at hand and input a name, as knowing the student's name is better than a greeting.<sup>115</sup> In this exchange, it may simply be "Debbie, I'm glad you stopped by so we can discuss your answer to the last essay." Names are important because an instructor's knowledge of one's name affects students' attitudes regarding the course and the instructor, particularly because when an instructor knows a student's name it makes them feel valued, it makes them feel comfortable seeking help, and it makes it easier to engage with the instructor.<sup>116</sup> It is

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105. Limberg, *supra* note 93, at 183.

106. *Id.* at 183-84.

107. *Id.* at 184.

108. *Id.*

109. *Id.* at 183.

110. *Id.*

111. HOLGER LIMBERG, *THE INTERACTIONAL ORGANIZATION OF ACADEMIC TALK: OFFICE HOUR CONSULTATIONS 131* (John Benjamins Publishing Co. 2010).

112. Limberg, *supra* note 93, at 183.

113. *Id.*

114. *Id.*

115. LIMBERG, *supra* note 111, at 134.

116. Maryellen Weimer, *The Importance of Learning Students' Names*, TEACHING PROFESSOR (Aug. 2, 2017), <https://www.teachingprofessor.com/topics/for-those-who-teach/importance-learning-students-names/>.

during this time that the professor and student may engage in small talk.<sup>117</sup> This stage may be referred to as rapport-building or engagement in other literature.<sup>118</sup>

### C. *Third Sequence*

The meeting in the third sequence moves into outlining the academic business whereby the student identifies their reason for visiting.<sup>119</sup> The transition into outlining may begin with the professor initiating with an invitation to begin the discussion,<sup>120</sup> for example, “What brings you to my office?” This sets the tone that the professor recognizes that her role is to assist the student with their academic concern and invites the student to divulge their problem.<sup>121</sup> Without an invitation from the professor, the student will likely take the lead in presenting her concern.<sup>122</sup> It is more likely to transition seamlessly from the identification sequence, for example,<sup>123</sup> “Hello. I’m having an issue understanding . . . .” Further, students may initiate a meeting by asking for an evaluation of an essay or paper they wrote so the professor evaluating the paper or essay then uses that evaluation to identify the problem the meeting will focus on.<sup>124</sup>

Office hours “are always (but not exclusively) task-oriented.”<sup>125</sup> That task is generally related to resolving the student’s problem.<sup>126</sup> Given the task, it is best to allow the student to set the initial agenda of the meeting, particularly if the student initiated the meeting.<sup>127</sup> Although, it should be noted that the topics set or outlined by the student for the meeting are in no way limited to those raised by the student, as there may be value in redirecting to other more important matters.<sup>128</sup> To empower the student to effectively lead, the professor should strive to actively listen to the student by engaging with the student by using primarily open-ended questions that shift the focus from the professor onto the student.<sup>129</sup> The use

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117. Limberg, *supra* note 93, at 183.

118. See Wellford-Slocum, *supra* note 3, at 299 (recognizing the importance of building a great rapport with the student). While rapport-building is important, it is beyond the scope of this article.

119. LIMBERG, *supra* note 111, at 120.

120. Wellford-Slocum, *supra* note 3, at 316; Limberg, *supra* note 93, at 185.

121. Limberg, *supra* note 93, at 185.

122. *Id.*

123. *Id.*

124. MURIEL HARRIS, TEACHING ONE-TO-ONE: THE WRITING CONFERENCE 45 (National Council of Teachers of English 1986).

125. Limberg, *supra* note 93, at 184.

126. *Id.*

127. *Id.*

128. See *id.*

129. Wellford-Slocum, *supra* note 3, at 306.

of open-ended questions, particularly those related to the student's interests and goals, makes the student feel recognized as a person.<sup>130</sup> Closed questions may help if the professor needs to clarify a statement made by the student, if there were previous communications between the student and professor for which the professor wants to return to, or if the professor initiated the meeting.<sup>131</sup> However, nonverbal communication is key during this phase.<sup>132</sup> Thus, to signal actual engagement, it is important that the professor is purposeful in conveying one's point through body language. These signals may include leaning in or head nodding.<sup>133</sup> Verbal signals like restating what has been said or "OK" are also good for signaling that one is actively listening.<sup>134</sup> Once the student has outlined the problem, the professor and student can begin to negotiate the key tasks and consider the appropriate strategies to address those problems.<sup>135</sup>

#### *D. Fourth Sequence*

In the fourth sequence, the professor and student move into the negotiation of academic business, which is the heart of the office hour.<sup>136</sup> During this stage of the conference, the focus is on getting to a solution.<sup>137</sup> However, it is paramount that the professor is able to demonstrate that they fully understand the problem and can assist the student in reaching a solution.<sup>138</sup> This may happen very easily if the problem is simple.<sup>139</sup> For example, if there is a simple grammatical issue in an essay or an issue that can be simply resolved by referencing the course syllabus or textbook. But more difficult problems may require further investigation through questioning and elaboration.<sup>140</sup> A number of the student issues in law school rest on a difficult problem, such as students considering career paths, or students who do not comprehend a substantive legal issue or a legal writing paradigm.<sup>141</sup> Unfortunately, this stage of the conference has the most potential for miscommunication.<sup>142</sup>

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130. *Id.*

131. *Id.*

132. *Id.* at 307.

133. *Id.* at 301.

134. *Id.* at 307.

135. *See* HARRIS, *supra* note 124; Limberg, *supra* note 93, at 184-85.

136. Limberg, *supra* note 93, at 185.

137. *Id.* at 186.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. *Id.* at 186.

Miscommunication is most likely to occur if the professor appears uninterested in the student's problem or if the student does not clearly convey their problem.<sup>143</sup> This is often what occurs in those situations when a professor or student leaves a meeting feeling as though nothing was resolved.<sup>144</sup> Thus, to ensure a successful meeting, both the student and the professor have to be in one accord as to the problem at hand.

In an instance where the professor does not believe the problem identified is best suited for the student, the professor should listen actively and, if possible, provide a solution before addressing another issue.<sup>145</sup> If the professor fails to at least acknowledge the concern raised by the student, it could lead the student to disengage.<sup>146</sup> Additionally, the student should be encouraged to present her concerns because she needs to develop the skill of self-regulating, whereby she can identify her problems and seek methods to correct those problems.<sup>147</sup>

Both professor and student should be careful not to try to address every concern in one meeting.<sup>148</sup> Instead the meeting should prioritize one or two of the most important concerns.<sup>149</sup> By addressing more than one or two concerns, the professor runs the risk of overwhelming the student or allowing the meeting to focus only on problems without providing solutions.<sup>150</sup> Further, the professor can train the student about how to properly prioritize issues by explaining why some issues are more important than others.<sup>151</sup> Training a student how to prioritize is of great importance for the student who tends to over focus on minor issues.<sup>152</sup> Part of the prioritization will be achieved by considering what stage of development the student is in.<sup>153</sup> For example, if a first-year student comes to the professor in the first few weeks of their first semester with an essay writing issue, it may make sense to first tackle how to solve underdeveloped rules or missed issues before addressing the analysis.

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143. *Id.*

144. *Id.*

145. Wellford-Slocum, *supra* note 3, at 314.

146. *Id.* at 313-14.

147. *Id.* at 311.

148. See Arbur, *supra* note 83, at 340 (stating that if there are several minor concerns then it may be permissible to address multiple issues).

149. *Id.*

150. See Wellford-Slocum, *supra* note 3, at 314; see also HARRIS, *supra* note 124, at 75.

151. See Arbur, *supra* note 83, at 340.

152. *Id.*; see also Wellford-Slocum, *supra* note 3, at 314.

153. Wellford-Slocum, *supra* note 3, at 266 (stating a conference can be used to focus on the individual student's "stage of cognitive development").

Further, in negotiating the problem, it is important to focus, where appropriate, on the craft of writing, thought processing, or behavior because these lead to strategies and tactics that can improve the problem and contribute to building a foundation for the student.<sup>154</sup> It is also important to remember that for many students an exam or paper is a reflection of them and the score they received is an indication that they are no longer perfect students.<sup>155</sup> If one focuses on the craft, one is encouraging the student to divorce themselves from the idea that they are a “C student” and thus, focuses on the student’s development as a professional that can maneuver with a better strategy.<sup>156</sup> Further, it engenders a growth mindset because it lets the student know that this is something they can fix and is not a reflection on their identity.<sup>157</sup> A growth mindset is “the belief that your level of intellectual ability is not fixed but rests to a large degree in your own hands.”<sup>158</sup> This belief has been proven to show that in the face of challenges, people who hold a growth mindset continue to achieve, in contrast to those with a fixed mindset or belief that intellect is determined at birth, who become helpless when challenged.<sup>159</sup>

Negotiating the problem is tied directly to finding a solution, and often times they cannot be easily separated.<sup>160</sup> The more complex a problem is, the more intertwined the negotiating and solutions are.<sup>161</sup> Once a party identifies a solution, the other must accept it if the conference is to succeed.<sup>162</sup> If one party disagrees with the proffered solution, then it may mean that the negotiating sequence needs to reopen.<sup>163</sup> Without the agreement of both the student and the professor, the meeting will likely end with the frustration of both parties.<sup>164</sup> Further, the agreement serves to commit the student to do something about the problem and the professor to assist in helping the student.<sup>165</sup>

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154. See Arbur, *supra* note 83, at 339.

155. See *id.*

156. *Id.*

157. See Douglas Stone & Sheila Heen, *Difficult Conversations 2.0: Thanks for the Feedback*, ROTMAN MGMT. 71, 73 (2014).

158. PETER C. BROWN ET AL., *MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING* 179 (Belknap Press 2014).

159. *Id.* at 179-80.

160. Limberg, *supra* note 93, at 187.

161. *Id.*

162. *Id.*; see also Arbur, *supra* note 83, at 341.

163. Arbur, *supra* note 83, at 341; see also Limberg, *supra* note 93, at 187 (stating because negotiating and solution seeking is intertwined this seems to be consistent with the idea that mutual agreement to the solution is necessary).

164. Limberg, *supra* note 93, at 189; Arbur, *supra* note 83, at 340.

165. Arbur, *supra* note 83, at 340.

Sometimes the solution may include a referral. If one encounters a student who is academically distressed or emotionally troubled, consider referring the student to student affairs or academic support, as they are experts in their respective areas and are likely aware of significant resources available to the student.<sup>166</sup> Further, if the student affairs or academic support professional gets referrals from multiple professors for the same student, they will likely become aware of a pattern with the student and can respond accordingly. Referring these students relieves one of the burden of trying to meet all the needs of the student and allows one to focus one's meeting on issues that can feasibly be addressed.

In working on a solution, the professor should look towards incorporating the research on learning science to assist the student in learning.<sup>167</sup> In particular, as will be discussed below, the professor should consider best practices for creating a student-centered learning environment during the negotiation of the problem so that the solution leads to transferable learning.<sup>168</sup>

### *E. Fifth Sequence*

Finally, the closing sequence generally occurs with the meeting concluding with an expression of gratitude from the student.<sup>169</sup> According to some, the function of this gratitude in some ways makes it seem as though a service has occurred during the office hour.<sup>170</sup> However, it is much more likely that the student expresses gratitude because they came with an expectation that the professor would be able to assist them, so when it occurs, gratitude is expressed; alternatively, it could also be that the student is appreciative that the professor took the time to spend with them. In any regard, at this juncture of the meeting, the professor should be careful to express their belief the student is able to accomplish the agreed solution to the problem(s).<sup>171</sup> Thus, by emphasizing the student's ability, the conference ends with a solution reached to the problems identified and, perhaps, a relationship between the professor and student is stronger.<sup>172</sup>

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166. NILSON, *supra* note 20, at 92.

167. Arbur, *supra* note 83, at 341.

168. *See id.* at 340 (stating that one should allow the student to explore the problem as part of the learning process rather than lecturing during the meeting which can disengage the student).

169. Limberg, *supra* note 93, at 188.

170. *Id.*

171. Arbur, *supra* note 83, at 342.

172. *Id.*

## IV. CREATING A LEARNER-CENTERED MEETING

In understanding the framework of the meeting, particularly the heart of the meeting being the negotiation of academic business whereby the student and professor work toward a solution, it is important to recognize how reaching that solution should be learner-centered. In making it a learner-centered encounter, many of the effective teaching techniques from class can be brought into the meeting. It is also important that one recognizes that with the shift in thinking about teaching, that it is equally applicable in the context of a one-on-one meeting. This statement captures that shift:

Until the early 1990s we focused our efforts solely on teaching. We identified characteristics of effective teachers and worked to incorporate them. Good teaching made for good learning. Then teaching was coupled with **learning**, and we started talking about them together. Teaching stopped existing in a sort of splendid isolation. Learning was no longer the assumed, inevitable outcome of good teaching. For many of us, our thinking made a paradigm shift. Teaching shouldn't be the driving force. It is learning that should be energizing our instructional endeavors.<sup>173</sup>

Thus, in working one-on-one with students, one should be cognizant of effective strategies for learning. Indeed, when one thinks about the one-on-one meeting, one should strive to make their meeting less of an extension of the classrooms and more about equipping students to learn transferable strategies. Transfer is one's cognitive ability to apply what one has learned in one context to another.<sup>174</sup> It may include applying what one has learned in Torts to Property, taking writing strategies from one's legal writing course and using them in their other classes, or using an interdisciplinary approach in the legal context.<sup>175</sup> Unfortunately, transfer is difficult for many students because it does not occur automatically and if the learning and transfer contexts are too different, it is more likely transfer will not occur.<sup>176</sup> This section will focus on three strategies that aid in keeping the meeting learner-centered, which can lead to

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173. Maryellen Weimer, *Word Choice: What You Call It Matters to Teaching and Learning*, TEACHING PROFESSOR (Aug. 31, 2016), <https://www.teachingprofessor.com/topics/for-those-who-teach/word-choice-call-matters-teaching-learning/>.

174. James M. Lang, *Why Don't They Apply What They've Learned, Part I*, CHRON. HIGHER EDUC. (Jan. 21, 2013), <https://www.chronicle.com/article/Why-Dont-They-Apply-What/136753>.

175. *Id.*

176. *Id.*



transfer: teaching strategies that promote retrieval, strategies to promote problem solving, and engaging students in professional development. Generally, whether these strategies are useful will depend on the context of the meeting, which will be explained below. For example, in a fifteen to thirty-minute meeting, it is likely one will be able to use one or two of these strategies.

Research related to learning has discovered several methods that are effective for long-term learning.<sup>177</sup> This research also discovered what fails to exist in learning, which is primarily passive engagement with material: highlighting, rereading, and passive listening.<sup>178</sup> In thinking about the office hour, unless one is purposeful in stimulating learning, then it is likely that the office hour will place the student into a seat of passive listening.

One way to resist passiveness in the office hour and make it learner-centered is to incorporate a learning strategy called retrieval. Retrieval is the act of trying to recall information once learned from memory.<sup>179</sup> Retrieval is not a new concept; instructors utilize this in doing quizzes and students do it when they review flashcards, look at the cue, and then try recalling it before flipping the card.<sup>180</sup> What is new about retrieval is supporting research that shows its utility in learning.<sup>181</sup> In recent years, researchers have demonstrated that retrieval plays an active role in actually assisting in the memorization process.<sup>182</sup> Indeed, studies show that the act of retrieving information is a powerful way of retaining information because it strengthens the associations one has with the material, even with incorrect responses, because the act of retrieving provides feedback which strengthens the associations with the correct information.<sup>183</sup>

This powerful learning technique is instructive for an office hour meeting. If students come to one's office seeking clarification of

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177. See generally BROWN ET AL., *supra* note 158; BENEDICT CAREY, *HOW WE LEARN: THE SURPRISING TRUTH ABOUT WHEN, WHERE, AND WHY IT HAPPENS* (Random House 2015) (elaborating on effect strategies such as retrieval, spacing, interleaving, practice testing, generation, elaboration, reflection, and more).

178. See JAMES M. LANG, *SMALL TEACHING: EVERYDAY LESSONS FROM THE SCIENCE OF LEARNING* 17 (Jossey-Bass 2016) (arguing that students will persist in using low effective strategies unless forced into using effective ones); Schwartz, *supra* note 44, at 374 (providing a scale of learning methods continuum from passive to active, with listening being the most passive).

179. See Jeffrey D. Karpicke, *Retrieval-Based Learning: Active Retrieval Promotes Meaningful Learning*, 21 CURRENT DIRECTIONS PSYCHOL. SCI. 157, 158 (2012) (describing retrieval as "the process involved in using available cues to actively reconstruct knowledge").

180. BROWN ET AL., *supra* note 158, at 3.

181. *Id.* at 28.

182. *Id.*

183. *Id.* at 28-29.

course content, then one can help them learn it better by engaging them in acts of retrieval, as it is an active and learner-centered action. For example, one might have the student look at a sample problem and have the student recall verbally and/or in writing the rules associated with the issues found in the problem; or if one is meeting with a student who does not understand a concept, then one might have them explain what they do know and attempt the parts they do not, providing feedback when the response is incorrect. The professor should also be transparent about her teaching strategy in the meeting by letting the student know that the reason why she is leading the student through a problem or quizzing them on what they know is because research on learning indicates retrieval is an effective tool for learning as opposed to the professor simply just telling the student what the concept is.<sup>184</sup> Being transparent during the office hour provides the student with a learning strategy she can duplicate on her own with other topics and perhaps other courses aiding in transfer. It is also important that students do practice retrieving on their own because to get the greatest benefit from retrieval, it needs to be repeated over spaces of time to reach a point of automaticity.<sup>185</sup>

One may be hesitant to direct student learning in a way that quizzes the student because it may appear to be handholding but consider that in order to move into higher order thinking about the law, one must first have knowledge of foundational concepts.<sup>186</sup> Retrieval assists students in acquiring that foundational information. Indeed, critical thinking is tied to foundational information stored in long-term memory.<sup>187</sup> If a lawyer does not understand foundational principles of a crime or civil issue, then it impedes her ability to ask her client questions, to develop research queries after meeting, and in preparing her argument adequately and fully for a brief or trial.<sup>188</sup> Because students will be life-long learners, it is important that professors teach their students how to learn and engage them in strategies such as retrieval that will assist them in their learning and lead to a meaningful learner-centered interaction.<sup>189</sup>

Another method of actively engaging with students in a learner-centered office meeting is to engage in problem solving. Problem

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184. LANG, *supra* note 178, at 40.

185. BROWN ET AL., *supra* note 158, at 28-29.

186. LANG, *supra* note 178, at 13-14, 39.

187. *Id.* at 16.

188. *See id.*

189. BROWN ET AL., *supra* note 158, at 28-29.

solving is one process of critical thinking.<sup>190</sup> In this context, problem solving is “a collection of possibilities that respond to a complex open-ended problem.”<sup>191</sup> Focusing on problem solving is a process focused approach, and as mentioned earlier, it properly emphasizes to the student that this is a strategy that can be learned engendering growth mindset.<sup>192</sup> Introducing problem solving during a one-on-one meeting has the effect of utilizing another highly effective learning strategy: generation. Generation is to provide an answer to something that is new to you, or it can be thought of as the process of trial and error.<sup>193</sup>

To engage a student in problem solving, one may start by asking why a student chose an approach, answer, articulation of a rule statement, or stopping point with research, crafted response, or analysis.<sup>194</sup> The student’s time spent attempting to create the answer is going to solidify the process by either being correct or the student will make a stronger connection to the actual process once revealed.<sup>195</sup> This process can also be reflective, particularly if the student is “visualizing and mentally rehearsing what [she] might do differently.”<sup>196</sup>

The purpose of the question of why a student chose a process is to assist the professor and student in determining where feedback is needed to clarify misconceptions or errors in analysis.<sup>197</sup> One might utilize this problem-solving question in instances where one is giving feedback to the student, such as with an assignment, student’s prewritten response to a sample essay, or writing assignment; the purpose of the feedback would be formative and allow the student to capitalize on what was learned in the one-on-one meeting.<sup>198</sup> Asking this question allows the professor to act as a coach, listening carefully as the student explains her process and offering timely suggestions as to how to make it better.<sup>199</sup> Feedback is in-

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190. LANG, *supra* note 178, at 16.

191. Maryellen Weimer, *To Improve Students’ Problem Solving Skills Add Group Work to the Equation*, FAC. FOCUS (Aug. 31, 2010), <https://www.facultyfocus.com/articles/teaching-and-learning/to-improve-students-problem-solving-skills-add-group-work-to-the-equation/>.

192. BROWN ET AL., *supra* note 158, at 179-80.

193. *Id.* at 94.

194. NILSON, *supra* note 20, at 92.

195. BROWN ET AL., *supra* note 158, at 87-88.

196. *Id.* at 89.

197. NILSON, *supra* note 20, at 92.

198. Megan Von Bergen, *Meaningful Learning Through One-on-One Conferences*, FAC. FOCUS (Dec. 11, 2017), <https://www.facultyfocus.com/articles/effective-teaching-strategies/meaningful-learning-through-one-on-one-conferences/>.

199. See LANG, *supra* note 178, at 131.

credibly important to ensure that the student leaves with an accurate problem-solving approach.<sup>200</sup> The benefit to the student in getting this feedback is improved as well because it is accessible and they can clarify orally given feedback because written feedback can sometimes be one-sided and possibly difficult to discern.<sup>201</sup>

Allowing a student to engage in problem solving is often a tedious process, but stimulating critical thinking is important to the student's growth as a professional. Professors should be mindful that lawyers' expert problem-solving skills allow them to "form their conceptual framework, thereby facilitating learning of new content associated with novel problems."<sup>202</sup> Students are novices who need explicit instruction and practice utilizing problem solving, and the office hour is one means for the expert professor to deliver it.<sup>203</sup> Additionally, in walking with the student through problem solving it is important to explicitly mention how this approach is fruitful in other contexts to aid in transferability of the process.

Unfortunately, once a grade has been assigned, particularly in the context of a post-exam grade conference, creating a learning environment may become a bit more challenging if one must maneuver past a student's desire for a grade justification.<sup>204</sup> But even once a grade has been assigned, learning can still occur by shifting the meeting to being process-oriented (e.g., how did the student learn the rules or what analytical process did the student use).

Next, because law students are entering the legal profession, the office hour is a perfect place to begin their development as professionals in a way that is learner-centered. Students need to work on these skills because as lawyers they may work within an organization that requires them to undergo performance evaluations or requires them to develop a professional development plan, requiring the articulation of development goals with timelines and some thought as to past feedback and expectations.<sup>205</sup> Further, professional development is something students seek out during office

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200. NILSON, *supra* note 20, at 92.

201. Von Bergen, *supra* note 198.

202. David Coil et al., *Teaching the Process of Science: Faculty Perceptions and an Effective Methodology*, 9 LIFE SCI. EDUC. 524, 525 (2010).

203. *See id.*

204. *See generally* Cassandra L. Hill & Katherine T. Vukadin, *Now I See: Redefining the Post-Grade Student Conference as Process and Substance Assessment*, 54 HOW. L.J. 1 (2010); Richard Henry Seamon, *Lightening and Enlightening Exam Conferences*, 56 J. LEGAL EDUC. 122, 122 (2006).

205. *See* Alnisa Bell, *Let's Get On It: Drafting Your Professional Development Plan*, MS. JD (Sept. 5, 2017), <https://ms-jd.org/blog/article/lets-get-on-it-drafting-your-professional-development-plan>.

hours, as students in a course they enjoy may consider visiting office hours to discuss the career path to understand how to enter the profession into that practice area. Additionally, students find great value in getting professional advice, particularly if they will be a first-generation attorney.<sup>206</sup>

Professional development as used in this paper can be defined as “the process by which attorneys [law students] acquire, increase and hone the knowledge, skills and attributes (often referred to collectively as ‘competencies’), which they need to effectively ‘do’ the work of lawyering and excel in the practice of law.”<sup>207</sup> Professional development for attorneys can include “training, work experience, feedback and evaluation, mentoring and coaching, and self-study.”<sup>208</sup> Training, which would include continuing legal educations (CLEs), work experiences, and self-study, which encompasses staying on top of developments in the law, are activities that are most likely to take place outside of office hours. Thus, office hours can be used as a guide to students in developing skills such as critically reflecting on or evaluating their expectations for practice, practice professional behaviors in a coaching environment, and to engage in the value of having mentoring or advising relationships with their professors.

Engaging students in professional development can be as simple as asking students to treat office hours like a professional environment. One might encourage students to bring a writing instrument to the meeting because that is what should be done in practicing law. If an appointment is set, it is an opportunity for the student to practice showing up on time or utilizing etiquette in alerting the professor to conflicts in advance if the student is unable to make it. If the student does not do these things, it is an opportunity for the professor to give the student feedback on expectations in practice in a way that is designed to educate, rather than admonish. When a student enters their professor’s office, the professor should shake their hand so that they can engage in the formalized nature of practice.<sup>209</sup> The professor can help reinforce the idea that “words are a

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206. Meera Komaraju et al., *Role of Student-Faculty Interactions in Developing College Students’ Academic Self-Concept, Motivation, and Achievement*, 51 J. C. STUDENT DEV. 332, 340 (2010).

207. Sandee Magliozzi & Susan P. Beneville, *Professional Development: Your Key to Success and Satisfaction*, SANTA CLARA L. DIGITAL COMMONS (Nov. 2008), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1912&context=facpubs>.

208. *Id.*

209. See Shauna Bryce, *Ask the Hiring Attorney: What Does It Mean to ‘Be Professional’?*, ABA FOR L. STUDENTS (Apr. 4, 2016), <https://abaforlawstudents.com/2016/04/04/ask-the-hiring-attorney-what-does-it-mean-to-be-professional/>.

lawyer's tool" and that the use of slang in oral or written communication can impact the student's perceived competence.<sup>210</sup> These things and more are about the appearance of being a professional,<sup>211</sup> but there are other ways to engage students in professional development that require significantly more depth.

Professional development through critical reflection is a goal that many law schools and instructors have for law students to develop. Critical reflection allows one to capitalize on learning from experience "by talking about their experiences, becoming aware of the assumptions and expectations they have, questioning these assumptions, and possibly revising their perspectives."<sup>212</sup> Critical reflections used in developing the work of teachers is instructive in this context because the practice of law, like teaching, is complex. Critical reflection moves budding attorneys from thinking about practice from a technical or how-to approach to broader questions about who they are, how they view others, what are the norms of the legal community, organizations the student may work for, and the society they live in.<sup>213</sup> While the greatest gains from this process are self-directed, professors can stimulate the process.<sup>214</sup> Yet, how to incorporate this competency is challenging because of perceptions by students, and sometimes by faculty, of critical reflection being a soft skill, that there can be limited time for incorporating it into a curriculum or course, or a number of other challenges. But given the one-on-one nature of the office hour, it lends itself to the ability of helping a student grow through reflection. And because growing professionally is a long process, it is helpful if the professor has built a relationship with the student to work across time to engage in critical reflection.<sup>215</sup>

To assist in developing critical reflection within the student, the professor must understand the type of work the student is engaged in and the organization in which the student works.<sup>216</sup> This requires the professor to listen carefully and actively, and as time

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210. *See id.*

211. *Id.*

212. PATRICIA CRANTON, PROFESSIONAL DEVELOPMENT AS TRANSFORMATIVE LEARNING: NEW PERSPECTIVES FOR TEACHERS OF ADULTS 2 (Jossey-Bass 1996).

213. Patricia Cranton & Kathleen P. King, *Transformative Learning as a Professional Development Goal, New Directions for Adult and Continuing Education*, 98 WILEY PERIODICALS 31, 32 (2003).

214. *See* CRANTON, *supra* note 212, at 3-4 (discussing how the author worked with a professor in reflecting on his teaching process).

215. *See id.* at 185.

216. *See id.*

passes, to move into challenging the student to think more critically.<sup>217</sup> An important part of the office hour is to balance being supportive and challenging.<sup>218</sup> In this space, the objective is to get the student to see what experiences the student has had, how they were selected, and why.<sup>219</sup> For example, if a student says she has only had family law experiences because her goal is to help people, ideally you want the student to evaluate the effect of her choice.<sup>220</sup> For example, one might challenge the student and ask if her view of helping people changes if she loses a family law case.<sup>221</sup> You might further probe about what impact a loss has on her: Does she want to continue finding resources or opportunities that stimulate helping others or does she want to revise her idea of what “helping” others means.<sup>222</sup> The goal is to help identify the available options for the student, not to impose one’s own goals or ideas.<sup>223</sup>

Further, professional development within the office hour can be achieved by mentoring or advising students. Mentoring offers benefits to students such as getting feedback on goals, developing skills, and receiving encouragement to grow.<sup>224</sup> Mentoring can be facilitated through the mentor professor using her experiences to help the mentee student evaluate opportunities such as career, research experiences, extracurricular activities, leadership opportunities, and more.<sup>225</sup> One goal of mentoring is to support the mentee’s autonomy in taking their own path.<sup>226</sup> One way to ensure the professor takes on a supportive role is to encourage the student to take control by setting goals.<sup>227</sup> Goal-setting is a key area for mentors to provide guidance, and it can have a great impact on the mentee’s success.<sup>228</sup> For example, if a student indicates that they struggle with oral skills, the professor may discuss with the student ways of acquiring that skill such as attending toastmasters or signing up for an intramural advocacy competition. The student and the professor may then work through what option is best for the student (from the example, toastmasters or competition), set a goal

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217. *Id.*

218. *Id.* at 186.

219. *Id.* at 187.

220. *See id.*

221. *See generally id.*

222. *See id.*

223. *See id.*

224. ALEXA LAMM & AMY HARDER, *Using Mentoring as a Part of Professional Development*, U. FLA., INST. FOOD AND AGRIC. SCI. EXTENSION 1, 2 (Dec. 2008), <http://edis.ifas.ufl.edu/pdffiles/WC/WC08200.pdf>.

225. *Id.* at 2.

226. *Id.* at 4.

227. *Id.*

228. *Id.* at 3.

(e.g., student signs up for one of the options to work on oral skills), and agree to review progress on the goal (improving oral skills) on a definitive date. Mentoring takes time and will likely require multiple meetings, although the frequency is dependent on both the professor and the student.<sup>229</sup> As shown in the example, to have an effective mentoring relationship, the student should return to discuss their progress in developing their oral skills, and to determine if what they did worked or if a new direction is needed.

In mentoring or advising law students for growth and for purposes of transfer, it helps to get students thinking “big picture” about the things that interests them in studying the law.<sup>230</sup> Get the student to think about why they came to law school, things they are passionate about, or projects they have worked on that have inspired them. In thinking big picture, the student can begin to see the connectedness of their courses and practice, thus becoming better at transferring their learning.<sup>231</sup> They can see that those abstract principles in Civil Procedure were key in interning with a judge or they will see the practice of making multiple arguments on one set of facts in an essay was applicable to filing a lawsuit on behalf of a client and making alternative claims. Encouraging students to apply what they have learned in class to their professional experiences and life will solidify their understanding of the law in a less abstract manner, and it will also allow you to guide them through challenges and new questions.<sup>232</sup> Thus, mentoring is a means to share one’s expertise for the development of the mentee student and it often leads to learning and growth for the mentoring professor.<sup>233</sup>

In conclusion, when one is negotiating the academic business, consider how one might integrate retrieval, problem solving, and/or professional development. Each of these can be enhanced by considering how to stimulate learning before or after the office hour. For example, one might require students to e-mail questions ahead

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229. *Id.* at 4.

230. James M. Lang, *Why They Don’t Apply What They’ve Learned, Part 2*, CHRON. OF HIGHER EDUC. (Feb. 19, 2013), <https://www.chronicle.com/article/Why-They-Dont-Apply-What/137389>.

231. *Id.*

232. James M. Lang, *Why They Don’t Apply What They Learn, Part 3*, CHRON. HIGHER EDUC. (Mar. 20, 2013), <https://www.chronicle.com/article/Why-They-Dont-Apply-What-They/137963>.

233. See LAMM & HARDER, *supra* note 224, at 1, 4.



of a meeting so that they can engage students in question generation, which is a highly effective learning strategy.<sup>234</sup> These questions may be about concepts they need clarification on, questions related to how to complete a task, or questions related to the profession. To stimulate learning after the meeting, one might ask the student to complete a follow-up task: “take a look at a hypothetical on a page of the textbook and send me a written response” or “once you have drafted a schedule for the next semester, let us meet to discuss your progress on internships related to this area.” One might ask students to engage in a reflection that requires students to assess their learning, actions that were helpful or hurtful to their efforts, to identify actions they will stop, continue, or try, and to create a study plan.<sup>235</sup> The sequence of a pre-meeting task, meeting, and reflection stimulates learning for the student.<sup>236</sup> In engaging in a learner-centered office hour, one will aid in the growth of one’s student both academically and professionally.

## V. CONCLUSIONS

The office hour is a great opportunity for student learning and engagement. However, with the growth of technology, the in-person office hour has been labeled as possibly obsolete. This article evaluated why office hours are still relevant, why students avoid office hours, and ways professors may engage students during visits. This article also evaluated how to set up one’s office for office visits, how to frame office hours, and how to create a learner-centered environment. However, one point that needs emphasizing from above is to recognize that institutional norms within a law school are a factor in perceptions of office hours. A law school committed to being inclusive and ensuring each student can succeed should consider how they can encourage professors to undertake an interest in holding office hours with students. The law school may consider an assortment of possibilities, including training sessions, that address how to meet with diverse students, appropriately counsel students, or provide “recognition, rewards, and incentives” for those who engage with students one-on-one.<sup>237</sup> Additionally, while there are educational and professional benefits to holding office hours, if office hours are fruitful and routinely used by students,

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234. April L. McGrath, *Just Checking In: The Effect of an Office Hour Meeting and Learning Reflection in an Introductory Statistics Course*, 4 TEACHING PSYCHOL. 83, 85 (2014).

235. *Id.* at 84-85.

236. *Id.* at 83 (citing research that has proven effective for student performance in a course when reflection is done when compared to students who do not).

237. Komarraju et al., *supra* note 206, at 340-41.

it can be a recruitment opportunity to be able to say that a law school provides an individualized legal education.<sup>238</sup>

As research continues to grow regarding the law school classroom, there is room for growth in investigating the office hour. In addition to the perspective on the office hour provided in this paper, there are a number of places that are ripe for investigation regarding the office hour in the future. One might study and record office hours within a law school or across law schools to see what framework is most effective for conducting office hours in law schools; this research may also provide information regarding what practices are most suitable for learning within an office hour. One might also investigate the frequency and types of one-on-one counseling or office hours provided within programs such as academic support, bar preparation, career services, student services and others. One might look at whether or not there is a correlation between grades, job placement, or other measures of success for those students who utilize their professors' office hours. One might also investigate office hours to determine if the approach to office hours should be altered based on an understanding of generational learning preferences. Finally, one might investigate the use of office hours and its impact on the academic support and retention of minority students. These and many others are fruitful areas to investigate office hours to extend the learning that occurs in office hours and to overcome messages that the office hour is obsolete.

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238. Note: If an institution would want to provide numbers behind this assertion, it could be done. An institution could ask professors and other legal educators to record each individual student meeting that lasts for a certain amount of time (e.g., meetings lasting more than 15 minutes or more) and these meetings can be coded for purposes (e.g., content-based, mentoring, admissions, bar support, etc.).

Cross-Cultural Differences in Plagiarism:  
Fact or Fiction?

*Diana J. Simon\**

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Are there cross-cultural differences in plagiarism? Is it helpful—let alone fair—to try to generalize attitudes toward plagiarism across cultures? Is this issue of relevance for learning institutions like law schools? And how do these issues intersect with the legal profession?

My perspectives on these issues stem from 25 years of legal practice handling complex commercial disputes combined with over 20

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years as a law school professor, first as an adjunct professor and now as a part of the legal writing department. The two perspectives—the practicing attorney view and the academic view—are not identical.

I started thinking about this issue when I began teaching international students years ago. I am fortunate to have taught students from all over the world: Palestine, Cambodia, Vietnam, Mexico, China, Africa, Canada, and Japan, among others.

As a litigator, I never really thought about plagiarism. I was focused on writing persuasive briefs, making persuasive arguments, building a client base, and winning cases. I was writing brief after brief that I borrowed from other people: other partners in my firm, judicial opinions, firm associates who had written the first draft, and the list goes on. Neither I, nor any professional colleague or opponent, was ever accused of wrongdoing by a judge. Simply speaking, plagiarism was a non-issue. Our profession understood the rules and, with few exceptions, abided by them.

Then, I started teaching at a law school where plagiarism is a hot issue. Students cheated. We have plagiarism policies. We have a software system to detect plagiarism. As the population of international students started to increase, I found myself starting to wonder: Are there cross-cultural differences in plagiarism?

This article addresses that question, as well as the different attitudes that prevail in the academic and professional worlds in five stages. Parts I, II, and III address differences that exist in views of plagiarism in the West as opposed to Asia, and Part IV addresses the response to those views, arguing that they are unfair and inaccurate stereotypes. Parts V, VI, and VII address plagiarism in the “real world” of litigation—the world in which most law students will reside upon graduation. Finally, Part VIII concludes with a modest proposal for handling plagiarism in law school.

Why is the focus only on Asia? That is where the literature has its focus, and that is where most of the international students who attend classes in the United States hail from.<sup>1</sup> Further, American

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1. *Number of International Students Studying in the United States in 2017/18, by Country of Origin*, STATISTA, <https://www.statista.com/statistics/233880/international-students-in-the-us-by-country-of-origin> (last visited Dec. 2, 2018) (showing China with the most students—363,431—and India and South Korea next in line with 196,271 and 54,555, respectively); see also Neil G. Ruiz, *The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations*, BROOKINGS (Aug. 29, 2014), <https://www.brookings.edu/interactives/the-geography-of-foreign-students-in-u-s-higher-education-origins-and-destinations> (relying on the number of foreign student visa approvals from 2001 to 2012, this report concluded that China had the most number of students coming to the United States, and Seoul, Beijing, Shanghai, Hyderabad, and Riyadh were the five foreign cities that sent the most higher education students to the United States).

universities are establishing and expanding their presence in China, so the issue is cropping up in that context as well.<sup>2</sup>

Before reading, though, be forewarned: I could not find any articles dealing with this topic for students in law school. The literature is mostly limited to undergraduate students or high school students. In addition, the literature is not “scientific.” Most of the articles on point are written by professors teaching international students and are based on their observations and knowledge through experience.

Before getting into the literature, let’s do a simple exercise.<sup>3</sup> Read the question below, and then, for each statement, indicate whether you “strongly agree,” “slightly agree,” “slightly disagree,” or “strongly disagree.” Then, rank them.

When I copy another’s materials without attribution when writing articles, reports, or essays, I am unfair:

1. *to myself* because I’m not being myself.
2. *to the college* because the educational goals of the college can never be reached if students just copy information.
3. *to myself* because the teacher might recognize what I did and punish or embarrass me in front of other students.
4. *to the writer of the original passage* because I’m taking the credit that he/she really deserves for the words and ideas.
5. *to my classmates* because most of them worked harder by writing in their own words, but I mainly copied and yet get the same or even better grade.
6. *to myself* because I’m not learning much when I just copy another person’s writing.

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2. See Lillian Foote, *American Universities Opening Up Shop in China—Sino-Foreign Joint Education Ventures*, HUFFINGTON POST (May 10, 2015, 1:32 AM), [http://www.huffingtonpost.com/china-hands/american-universities-ope\\_b\\_7250306.html](http://www.huffingtonpost.com/china-hands/american-universities-ope_b_7250306.html).

3. This list of questions is taken from a study conducted by Glenn Deckert at Hong Kong Baptist College and will be more fully addressed in Part II. Glenn D. Deckert, *Perspectives on Plagiarism from ESL Students in Hong Kong*, 2 J. SECOND LANGUAGE WRITING 131, 131-148 (1993). It might be interesting to administer a similar questionnaire to law students to see: (1) whether graduate students would answer these questions differently from undergraduate students; and (2) what differences, if any, exist between the answers of American students and the answers of international students.

7. *to my teacher* because he/she is trying to teach me to write well, but I'm not cooperating.<sup>4</sup>

If you strongly agree with answers one and six, your answers are like a small group of first year students at a college in Hong Kong, whose primary concerns are egocentric concerns about learning and feeling right about oneself.<sup>5</sup> In contrast, from a Western perspective, the most important concerns are “for either the college, the original writer, one’s own classmates, or one’s relationship with the teacher.”<sup>6</sup> More on that study and the author’s findings later.<sup>7</sup>

# I. ONE SCHOOL OF THOUGHT: DIFFERENCES IN ATTITUDES BETWEEN THE WEST AND ASIA TOWARD PLAGIARISM ARE EXPLAINED BY CULTURAL DIFFERENCES.

One view is that the practices and perceptions of Asian students vary from Western academic practice when it comes to plagiarism.<sup>8</sup> While one proponent of this view, Colin Sowden, cautioned that it is important to avoid stereotyping, he then seemed to make several generalizations.<sup>9</sup>

One such generalization is that Asian students accept the idea of “communal ownership of knowledge.”<sup>10</sup> For example, if a source or philosopher is extremely well known, the information has entered the realm of common knowledge, and there is no reason to think that the ideas belonged to that philosopher.<sup>11</sup> Similarly, citing sources in these situations is seen as disrespectful or insulting to your professor because you are insinuating that your professor does not know the source, which could be as obvious as Aristotle or Confucius.<sup>12</sup>

Another “cultural characteristic” is that good students do not challenge their teachers, but rather “faithfully copy and reproduce

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4. *Id.* at 135.

5. *Id.* at 140.

6. *Id.*

7. *See infra* Part II.

8. Colin Sowden, *Plagiarism and the Culture of Multilingual Students in Higher Education Abroad*, 59 *ELT J.* 226, 226 (2005); *see also Campus Collaboration*, *ECONOMIST* (Jan. 5, 2013), <https://www.economist.com/china/2013/01/05/campus-collaboration>; Kia Farhang, *For Some International Students, 'Plagiarism' is a Foreign Word*, *MINN. PUB. RADIO NEWS* (Oct. 8, 2014), <https://www.mprnews.org/story/2014/10/08/international-students-cheating>; David Volodzko, *Korea's Plagiarism Problem*, *DIPLOMAT* (Aug. 31, 2014), <https://thediplomat.com/2014/08/koreas-plagiarism-problem>.

9. *See* Sowden, *supra* note 8.

10. *Id.*

11. *See id.* at 226-27.

12. Farhang, *supra* note 8.

them.”<sup>13</sup> Plagiarism of a teacher or person of authority is a virtue, a sign of respect: the student is simply reproducing what the student knows to be true.<sup>14</sup> In fact, the term “[s]tudy, for Confucius, means finding a good teacher and *imitating* his words and deeds.”<sup>15</sup>

In the literature, generalizations also exist about the nature of the Asian culture as a collectivist culture.<sup>16</sup> Achieving group consensus is valued over individualist thinking.<sup>17</sup> For example, in China, the emphasis is on allegiance to a few acknowledged authorities with “resulting convergence of perspective and greater social harmony.”<sup>18</sup> Stated more critically, China is a society of official standard thought, and “[m]any academics who commit plagiarism are also officials, so they’re seldom held responsible.”<sup>19</sup>

Another underlying reason that exists for cultural differences is that learning takes place through rote memorization, and rote memorization is more important than expressing creativity.<sup>20</sup> For example, an author and college professor, Glenn Deckert, after six years of teaching first-year Hong Kong college students, concluded: “most Chinese students overuse source material through an innocent and ingrained habit of giving back information exactly as they find it. They are the proverbial rote memorizers or recyclers.”<sup>21</sup> One professor, who taught English at Xiangtan University in China,<sup>22</sup> tells this story: He asked his “first-year undergraduate English majors to write a brief biography of a well-known person.”<sup>23</sup> While grading one paper, he saw a piece on Abraham Lincoln that was written in “simple but perfectly ‘correct’ prose.”<sup>24</sup> He asked a fourth-year student what he thought about the text and that stu-

13. Sowden, *supra* note 8, at 227.

14. *Id.*

15. Jeffrey Riegel, *Confucius*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2013) (emphasis added).

16. Sowden, *supra* note 8, at 227.

17. *Id.*

18. Deckert, *supra* note 3, at 132.

19. Louisa Lim, *Plagiarism Plague Hinders China's Scientific Ambition*, NPR (Aug. 3, 2011, 2:15 PM), <https://www.npr.org/2011/08/03/138937778/plagiarism-plague-hinders-china-scientific-ambition>.

20. Alastair Pennycook, *Borrowing Others' Words: Text, Ownership, Memory, and Plagiarism*, 30 TESOL Q. 201, 218 (1996); Sowden, *supra* note 8, at 229; *see also* Farhang, *supra* note 8.

21. Deckert, *supra* note 3, at 133.

22. Pennycook, *supra* note 20, at 201-02; *see also id.* at 218 (noting that it is “not uncommon in discussions of plagiarism to hear . . . [Chinese] students . . . derided as rote learners”).

23. *Id.* at 201.

24. *Id.* at 201-02.

dent smiled and explained: it “was from one of the high school textbooks.”<sup>25</sup> That fourth-year student then proudly “demonstrated that he too knew the text by heart.”<sup>26</sup>

## II. THE HONG KONG STUDY: PERSPECTIVES ON PLAGIARISM FROM HONG KONG BAPTIST COLLEGE.

In this study, Deckert sought to discover how well students in Hong Kong pursuing English as a second language recognize plagiarism and how they view students who plagiarize.<sup>27</sup> The study questioned “239 first-year students at Hong Kong Baptist College, a government-funded, degree-granting institution with 3,400 students.”<sup>28</sup> Later, for comparison purposes, the study was expanded to include third-year students.<sup>29</sup>

In one part of the experiment, the students were given questionnaires to determine the students’ views on the practice of plagiarism.<sup>30</sup> Specifically, they were asked the questions at the beginning of this article.<sup>31</sup> The greatest percentage of students, 47%, selected answer six as the most important reason as to why plagiarism is wrong: “I’m *unfair to myself* because I’m not learning much when I just copy another person’s writing.”<sup>32</sup> The second most popular response to the question was answer one: “When I write this way, I’m *unfair to myself* because I’m not being myself. Rather, I’m pretending to be better than I am, and that makes me feel uncomfortable.”<sup>33</sup> Thus, approximately 63% of the first-year students focused on themselves as the object of unfairness, instead of concerns about “the college, the original writer, one’s own classmates, or one’s relationship with the teacher.”<sup>34</sup>

This same questionnaire was then submitted to a smaller number of third-year students.<sup>35</sup> These third-year students had finished all their English for Academic Purposes classes in which plagiarism was systematically addressed.<sup>36</sup> Notably, there was a change of perspective as to why plagiarism is wrong, showing that these students

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25. *Id.* at 202.

26. *Id.*

27. Deckert, *supra* note 3, at 131.

28. *Id.* at 133.

29. *Id.* at 133-34.

30. *Id.* at 134.

31. *Id.* at 135; *see also supra* note 3 and accompanying text.

32. Deckert, *supra* note 3, at 135, 139.

33. *Id.*

34. *Id.* at 139-40.

35. *Id.*

36. *Id.*



were in line with the “typical concerns of a Western academic community.”<sup>37</sup> In fact, only 19.5% of the third-year students saw unfairness focused on themselves.<sup>38</sup> Instead, “concern for the original writer rose from 13.5% among first-year students to 39.0% among third-year students.”<sup>39</sup> Among the teaching suggestions flowing from this research, the author suggested that students should be taught about plagiarism and about reading source material with a view toward critical analysis.<sup>40</sup> The instructor should also be a good role model by crediting sources when lecturing.<sup>41</sup>

Because one true story about plagiarism can speak volumes, here is one about Chinese high school students and cheating.<sup>42</sup> The article reporting on the event begins: “What should have been a hushed scene of 800 Chinese students diligently sitting their university entrance exams erupted into siege warfare after [proctors] tried to stop them from cheating.”<sup>43</sup> Because plagiarism was discovered the year prior to the incident, a new policy to prevent cheating was instituted.<sup>44</sup> When students arrived to take a university entrance exam, proctors used metal detectors to relieve students of their cellphones and secret transmitters, some of which were designed to look like pencil erasers.<sup>45</sup> These proctors also caught people trying to communicate with students from a location opposite the testing location.<sup>46</sup> As soon as the exams were over, a mob of parents began protesting.<sup>47</sup> More than 2,000 outraged people gathered to smash cars and chant: “We want fairness. There is no fairness if you do not let us cheat.”<sup>48</sup>

### III. UNIQUE PRESSURE TO CHEAT: SPECIAL FOCUS ON KOREA.

Reading about this incident led me to investigate whether there are pressures to cheat beyond those in a “typical” Western academic community. As one author asked: “[Intellectual fraud] occur[s] eve-

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37. *Id.*

38. *Id.*

39. *Id.* at 141.

40. *Id.* at 142.

41. *Id.*

42. See Malcolm Moore, *Riot After Chinese Teachers Try to Stop Pupils Cheating*, TELEGRAPH (June 20, 2013, 3:25 PM), <https://www.telegraph.co.uk/news/world-news/asia/china/10132391/Riot-after-Chinese-teachers-try-to-stop-pupils-cheating.html>.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

rywhere, of course, but is there a particular susceptibility in Korea?"<sup>49</sup> In addition to the practice of copying encouraged in Confucianism, "Confucianism also places a premium on social status" measured, in part by one's profession and educational background.<sup>50</sup> Faking accomplishments is one way of having some upward social mobility.<sup>51</sup> Beyond this, there is a "maniacally strenuous [educational] system."<sup>52</sup> South Korean teens would "rather die than fail," and "suicide remains the leading cause of death among Koreans aged 15 to 24."<sup>53</sup>

Shocked to see this statistic, I went to the source, the Organisation for Economic Co-operation and Development, or the OECD. Established in 1961 with a membership of 36 countries, its mission is to "promote policies that will improve the economic and social well-being of people around the world."<sup>54</sup> Its membership list includes, among others, the United States, Canada, Denmark, Finland, France, Germany, Greece, Israel, Italy, Japan, Korea, Mexico, Portugal, Spain, Turkey, and the United Kingdom.<sup>55</sup> Notably (at least for purposes of this article), China is not a member.<sup>56</sup>

OECD assesses students internationally and has created a Programme for International Student Assessment (PISA).<sup>57</sup> It was first administered in 2000 and now covers 80 countries, including China.<sup>58</sup> The study is for 15-year-old children.<sup>59</sup> The last study was completed in 2015.<sup>60</sup> Based on this study, students in Korea reported high emphasis on achievement—80% of students wanted to be the best in what they do, whereas the OECD average is 65%.<sup>61</sup> Some 75% of Korean students worry about getting poor grades at school, whereas the OECD average is 66%.<sup>62</sup> Twenty-three percent

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49. Volodzko, *supra* note 8.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *About the OECD*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/about> (last visited Oct. 27, 2018).

55. *Members and Partners*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/about/membersandpartners> (last visited Oct. 27, 2018).

56. *Id.*

57. *PISA-FAQ*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/pisa/pisafaq/> (last visited Oct. 27, 2018).

58. *Id.* Although China is not a member, starting in 2015, it agreed to cooperate with the organization and participate in some of its studies. *Id.*

59. *Id.*

60. *See generally* PISA, PISA 2015 RESULTS (VOLUME III): STUDENTS' WELL-BEING (OECD Publishing, ed. 2017).

61. *Id.* at 1.

62. *Id.*

of Korean students reported studying more than 60 hours, while the OECD average was 13%.<sup>63</sup>

This high-stakes academic pressure is further illustrated by what happens on the day Korean students take their annual university entrance exam known as the *Suneung*.<sup>64</sup> The entire nation goes into “hush” mode on exam day, even grounding planes, clearing roads, and halting military exercises during the main language listening test.<sup>65</sup> It’s like the SAT, but “the importance that Korean society places on it makes it far more intense.”<sup>66</sup>

These types of pressures to conform and excel within a community probably interfere with creativity and individualism. After all, writing from scratch without reference to any other work is a form of individualism. In contrast, repeating what has already been written is an act of conformance. There is, of course, another side to the story.

#### IV. THE SECOND SCHOOL OF THOUGHT: SUCH STEREOTYPES ARE HOGWASH<sup>67</sup> AND HYPOCRITICAL.

The other viewpoint is that these generalizations and cultural stereotyping amount to nothing more than “teacher folk wisdom.”<sup>68</sup> For example, in one book, the author noted that the “sheepish” student in the anecdote about memorizing information about Abraham Lincoln<sup>69</sup> “knew perfectly well that he had not done the writing assignment as intended.”<sup>70</sup> Other authors attack the reasoning of

63. *Id.* at 3.

64. Anna Diamond, *South Korea’s Testing Fixation*, ATLANTIC (Nov. 17, 2016), <https://www.theatlantic.com/education/archive/2016/11/south-korean-seniors-have-been-preparing-for-today-since-kindergarten/508031/>.

65. Khaleda Rahman, *South Korea Orders All Planes to be Grounded, Roads to be Cleared and Military Exercises Halted . . . So University Students Can Take Their Entrance Exams in Peace*, DAILY MAIL (Nov. 13, 2014, 6:54 AM), <https://www.dailymail.co.uk/news/article-2832898/South-Korea-orders-planes-grounded-roads-cleared-military-exercises-halted.html>.

66. Elise Hu, *Even the Planes Stop Flying for South Korea’s National Exam Day*, NPR (Nov. 12, 2015, 12:01 PM), <https://www.npr.org/sections/parallels/2015/11/12/455708201/even-the-planes-stop-flying-for-south-koreas-national-exam-day>.

67. *Hogwash*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/hogwash> (last visited Oct. 27, 2018). For readers who are not familiar with this term, it was formed around the mid-15th century and means a type of pig and waste liquid or food refuse from a kitchen. Although the meaning of it has changed over the centuries, it now means anything that is nonsense. *Hogwash—Historical Origins of English Words and Phrases*, LIVEJOURNAL, <https://word-ancestry.livejournal.com/129790.html> (last visited Jan. 8, 2019).

68. BRADLEY BAURAIN, VOICES, IDENTITIES, NEGOTIATIONS, AND CONFLICTS: WRITING ACADEMIC ENGLISH ACROSS CULTURES 129 (2011).

69. See Pennycook, *supra* note 20, at 201-02 and accompanying text.

70. BAURAIN, *supra* note 68, at 130.

Sowden in his article, explaining that while his work is “well-intentioned and interesting, [his] article, like most of those holding the same position, is flawed in several ways, including relying on dubious assumptions about other cultures’ writing practices, and using unwarranted conflation of separate concepts or issues to advance his argument.”<sup>71</sup>

Many of these writers criticize as hypocrites those who approach the issue of plagiarism from some moral high ground.<sup>72</sup> These writers, who pretend to be open-minded, instead place English in a superior position and place “other languages and rhetorical traditions . . . in a deficit position.”<sup>73</sup> This tendency of Westerners to thumb their noses at language traditions different from their own also disregards or ignores a “well-established tradition of cheating and plagiarism in Western education.”<sup>74</sup>

In fact, an entire encyclopedia could be written using examples of Western plagiarism because the list of “accused plagiarists is long and prestigious.”<sup>75</sup> For example, many of Benjamin Franklin’s sayings were taken from other sources, and he even referenced this practice when he asked, “Why should I give my Readers bad lines of my own when good ones of other People’s are so plenty?”<sup>76</sup> Also, John F. Kennedy’s famous “Ask not what your country can do for you; ask what you can do for your country,” and Franklin D. Roosevelt’s, “The only thing we have to fear is fear itself,” were borrowed from other sources.<sup>77</sup>

In addition to famous lines by memorable orators, famous writers are also plagiarists. For example, Alex Haley, who won a Pulitzer Prize for *Roots*, an account of several generations of an African-American family living in America, a family that Haley said was his own, admitted as part of a settlement of a lawsuit against him, that some sections of his book originally appeared in a novel called *The African*.<sup>78</sup> Gail Sheehy, whose book *Passages* was a national best-seller, also settled a plagiarism lawsuit, under the terms of which her accuser collected “\$10,000 down plus 10 percent of all royalties,

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71. Dilin Liu, *Plagiarism in ESOL Students: Is Cultural Conditioning Truly the Major Culprit?*, 59 ELT J. 234, 234 (2005); see also Phan Le Ha, *Plagiarism and Overseas Students: Stereotypes Again?*, 60 ELT J. 76, 76 (2006).

72. See BAURAIN, *supra* note 68, at 129.

73. *Id.*

74. *Id.* at 130.

75. Pennycook, *supra* note 20, at 206.

76. *Id.* at 208.

77. *Id.*

78. Arnold Lubasch, *‘Roots’ Plagiarism Suit is Settled*, N.Y. TIMES, Dec. 15, 1978, at A1 (reporting of settlement of lawsuit against Haley by Harold Courlander who contended there were substantial similarities between *Roots* and his earlier novel).

including a \$250,000 paperback sale.”<sup>79</sup> In addition, in 1991, a committee of scholars at Boston University found that Dr. Martin Luther King, Jr. plagiarized passages in his dissertation for a doctoral degree in 1955.<sup>80</sup>

Generally, in the West, many of our general practices condone plagiarism.<sup>81</sup> For example, political figures rely on speechwriters to write their speeches.<sup>82</sup> Moreover, company executives routinely sign their name to documents drafted by underlings.<sup>83</sup> In addition, in our own profession,<sup>84</sup> lawyers borrow from the work of underlings and other lawyers, judges borrow from the work of lawyers, and then lawyers, in turn, borrow work from those judges.

Plagiaristic hypocrisy was perhaps at its finest when, in 1980, Stanford University learned that its handbook on plagiarism had itself been plagiarized by the University of Oregon.<sup>85</sup> Oregon officials apologized and said they would revise their guidebook.<sup>86</sup>

In addition, one author argues that the idea that “cultural conditioning is primarily responsible for plagiarism among . . . Asian students is a dubious one.”<sup>87</sup> Fundamentally, authors take aim at the idea that “[w]hat [Westerners] might call cheating, [students from Eastern cultures] might call . . . sharing.”<sup>88</sup> They contend that the truisms about Asian culture and plagiarism, such as the collectivist culture, learning by imitation, and strong respect for authority, while usually well-intentioned, spring “from a morally lethal combination of half truths and ideological assumptions.”<sup>89</sup>

For example, in one article, the author referred to the claim that plagiarism is acceptable in the Far East as “dubious.”<sup>90</sup> He referred

79. *Book Ends*, N.Y. TIMES, May 30, 1976, at 161.

80. Associated Press, *Boston U. Panel Finds Plagiarism by Dr. King*, N.Y. TIMES, Oct. 11, 1991, at A00015.

81. See, e.g., Deckert, *supra* note 3, at 132.

82. *Id.*; see also Gil Troy, *How Originality Vanished From Political Speeches*, POLITICO (July 21, 2016), <https://www.politico.com/magazine/story/2016/07/melania-trump-speech-writer-plagiarism-ghostwriters-history-214081> (Warren Harding was the first President to hire a full-time White House speechwriter but a “speechwriter taboo mostly persisted until Franklin Roosevelt’s New Deal expanded the [White House] exponentially.”).

83. Deckert, *supra* note 3, at 132.

84. See *infra* Part V.

85. Pennycook, *supra* note 20, at 212-13.

86. *Id.* at 213. Though this example might be ironic, some might argue that it also falls into the realm of the absurd. Plagiarism policies in handbooks are a form of rule-making, and, in some ways, are no different than statutes. For example, there are many uniform laws on the books but no state accuses another state of plagiarism. This is another place where the academic world and the practical world do not see eye to eye.

87. Liu, *supra* note 71, at 239.

88. Farhang, *supra* note 8.

89. BAURAIN, *supra* note 68, at 129.

90. Liu, *supra* note 71.

to several examples such as: 1) plagiarism, as a practice, has been considered unethical for a long time; 2) the two Chinese words for plagiarism are derogatory and mean to rob and steal; 3) six Chinese books on composition published in the 1980s and 1990s (before the onset of this controversy on multi-cultural differences), all required citation of sources for information that is borrowed; and 4) even in ancient China, writers had to cite to "Zi," a shorthand for Confucius, when quoting Confucius.<sup>91</sup> Further, while plagiarism is a problem in China, as it is elsewhere, this does not mean it is acceptable, and the media criticizes it routinely.<sup>92</sup>

In addition, Liu argues that Sowden's suggestion that memorization and respect for authority lead to plagiarism is speculative.<sup>93</sup> While Chinese students do rely on memorization to learn, this method is to learn how to write better and is not the same as copying work and claiming it as the writer's own.<sup>94</sup> In fact, if memorization is used as a tool for copying, it is condemned in the Chinese language because the word for that practice means, literally, "dead and inflexible memorization."<sup>95</sup>

Also, as for whether group work or sharing knowledge to promote harmony leads to plagiarism, this type of learning in groups is more prevalent in the West.<sup>96</sup> Therefore, why is it that a practice in the East is more likely to lead to plagiarism than the exact same practice in the West?<sup>97</sup> In sum, the author concluded that viewing the issue as one of culturally conditioning yields no pedagogical solutions, and the real culprit is lack of language proficiency and resources.<sup>98</sup>

In another article published in response to Sowden's findings, a lecturer teaching in Hanoi argued that in Vietnam, like China, plagiarism is neither allowed nor legitimate.<sup>99</sup> The Vietnamese terms for plagiarism have negative connotations.<sup>100</sup> Further, although memorizing essays and showing respect for authorities are both common practices, neither practice encourages plagiarism.<sup>101</sup> In Vi-

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91. *Id.* at 235-36.

92. *Id.* at 236.

93. *Id.* at 237.

94. *Id.*

95. *Id.*

96. *Id.* at 238.

97. *Id.*

98. *Id.* at 239. The author, however, also stated that the main reasons for plagiarism among Asian students should be studied with "[e]xtensive empirical research." *Id.*

99. Ha, *supra* note 71.

100. *Id.*

101. *Id.*

etnam, for example, when quoting Ho Chi Minh, the source is supposed to be acknowledged by saying “Uncle Ho.”<sup>102</sup> The author also explained that in Vietnam, the convention and accepted practice for acknowledging sources is by including a full list of sources in a bibliography at the end of the paper.<sup>103</sup> In sum, the author is critical of academics in the West who hold inaccurate stereotypes about Asian students and then legitimize the act of plagiarism in Asian societies.<sup>104</sup>

It might be that the truth is somewhere in between the different perspectives on this issue. It might depend on the individual student and that student’s experience and background. It might depend on the nature of the task the student is asked to perform. Nonetheless, the best approach seems to be that a teacher should avoid stereotyping, but not be wholly blind to, or ignorant about, differences that might exist in different cultures on the issue of plagiarism.

V. PLAGIARISM AND LITIGATION: DID YOU HEAR ABOUT THE LITIGATOR WHO WAS SANCTIONED FOR PLAGIARISM? THIS SOUNDS LIKE THE LEAD-IN TO A JOKE.<sup>105</sup>

Because we are training law students to be lawyers and because I was a litigator for so many years, it seems highly impractical to divorce plagiarism in the academic setting from plagiarism as a practicing lawyer—which law students will become when they leave the academic nest.

A litigator’s job is not to create original works. Rather, a litigator’s job is to win, and in order to win, an effective legal writer must write about precedent, quote legal authorities selectively, and rely on earlier documents and thinkers.<sup>106</sup> In fact, as a young associate working for a large firm, I remember that when I first received an assignment to write a motion, my first question was to ask whether anyone had written a similar motion, so I could build off that prior motion. No one chastised me for asking this; this was considered a form of initiative.

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102. *Id.* at 76-77.

103. *Id.* at 77-78.

104. *See id.* at 78.

105. Benjamin G. Shatz & Colin McGrath, *Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing*, 26 CAL. LITIG. 14, 14 (2013).

106. *Id.*

Litigators often and appropriately copy from others in writing briefs and pleadings.<sup>107</sup> Lawyers routinely rely on form books, and even the Federal Rules of Civil Procedure contain an appendix of forms.<sup>108</sup> Law firms have brief and pleading banks, and, to save money for the client, lawyers are discouraged from reinventing the wheel. Interestingly, Rule 11 contains a list of representations when a lawyer signs a pleading, such as: 1) the pleading “is not being presented for any improper purpose;” 2) “claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;” 3) “the factual contentions have evidentiary support;” and 4) “the denials of factual contentions are warranted on the evidence.”<sup>109</sup> Nowhere in this list is a claim of originality of authorship.<sup>110</sup>

In addition, litigation filings are widely recognized as a blend of research, writing, and editing by multiple authors, some of whom get no credit. Judge Posner, in his book on plagiarism, gives the example of the solicitor general, who “signs the briefs that the federal government submits to the Supreme Court, though he does not write them.”<sup>111</sup> Similarly, when an attorney “ghost writes” a brief in representing a *pro se* party without either the lawyer or the party acknowledging that contribution, the American Bar Association has determined that this non-disclosure does not violate the Model Rules of Professional Conduct.<sup>112</sup> Finally, at least in North Carolina, it is not unethical for one lawyer to use several pages of another lawyer’s brief, even without that second lawyer’s permission, and even where the lawyers do not practice together.<sup>113</sup> Essentially, North Carolina’s State Bar Council reasoned that lawyers often rely on the work of others when writing a brief, “the application of the common law is all about precedent, which invites the re-use of arguments,” and the utilization of others’ work furthers the client’s interest by reducing the time required to prepare a brief and, thus, reducing the charge to the client.<sup>114</sup>

Even judges themselves are not immune from plagiarism. Judge Posner writes that “only a small minority [of judges write their own

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107. Peter A. Joy & Kevin C. McMunigal, *The Problems of Plagiarism as an Ethics Offense*, 26 CRIM. JUST. 56, 57 (2011).

108. *Id.*

109. *Id.*; FED. R. CIV. P. 11(b).

110. *See* FED. R. CIV. P. 11(b).

111. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 26 (Pantheon Books, 2007).

112. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (2007).

113. N.C. State Bar, Formal Ethics Op. 14 (2008).

114. *Id.*



opinions]; the others edit their law clerks' opinion drafts to a greater or lesser extent—sometimes so extensively that the judge deserves to be considered a coauthor . . . though not the sole author.”<sup>115</sup> Judges or clerks also often insert into their opinions, “without attribution, verbatim passages from lawyers' briefs.”<sup>116</sup> One of my proudest moments as a lawyer was when a judge ordered relief never before ordered in the state (pre-filing injunctive relief) and copied my findings of fact and conclusions of law verbatim. Not once did it cross my mind that I should get attribution. All these examples of copying in litigation only scratch the surface.

## VI. THE DEFINITIONS OF PLAGIARISM.

There are many well-known quotes about plagiarism that, in a nutshell, reflect just how controversial a concept it is. As one American playwright wrote: “If you steal from one author, it's plagiarism; if you steal from many, it's research.”<sup>117</sup> Or, as T.S. Eliot said, “Immature poets imitate; mature poets steal.”<sup>118</sup>

In a more serious vein, *Black's Law Dictionary* defines plagiarism as the “deliberate and knowing presentation of another person's original ideas or creative expressions as one's own.”<sup>119</sup> If this definition were applied to any of the examples of legal writing referenced in the preceding section, all of them would qualify. As for colleges, the University of Oregon defines plagiarism to mean “using the ideas or writings of another as one's own.”<sup>120</sup> In contrast, the University of Washington's definition of plagiarism, based on a state statute, defines plagiarism more broadly to mean “the submission or presentation of someone else's words, composition, research, or expressed ideas, whether published or unpublished, without attribution.”<sup>121</sup> Under both of these definitions, lawyers writing briefs would qualify.

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115. POSNER, *supra* note 111, at 20-21.

116. *Id.* at 21.

117. While this quote is credited to various people, it is often attributed to the playwright Wilson Mizner. *If You Steal From One Author, It's Plagiarism; If You Steal From Many, It's Research*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2010/09/20/plagiarism> (last visited Nov. 9, 2018).

118. T.S. ELLIOT, *Phillip Massinger*, in *THE SACRED WOOD* 112, 114 (1920).

119. *Plagiarism*, BLACK'S LAW DICTIONARY (9th ed. 2009).

120. *Student Conduct Code*, U. OR., <https://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code> (last visited Dec. 2, 2018).

121. *Student Conduct Policy for Academic Misconduct and Behavioral Misconduct*, U. WASH., <http://www.washington.edu/admin/rules/policies/SGP/SPCH209.html#5> (last visited Dec. 2, 2018).

A more workable, practical definition of plagiarism in the context of litigation was proffered by Judge Posner. After stating that “originality is not highly prized in law” and discussing common practices among practicing lawyers, he posited that the “reader has to *care* about being deceived about authorial identity in order for the deceit to cross the line to fraud and thus constitute plagiarism.”<sup>122</sup> He introduced an element of detrimental reliance.<sup>123</sup> In other words, in all these situations referenced above, no one is claiming originality, and no one expects those materials to be original. For example, “[n]o one accuses judges of plagiarism . . . [and] the quality of a judicial opinion is a function of the soundness of its reasoning, not its originality.”<sup>124</sup> Only a definition of plagiarism that includes detrimental reliance could account for why litigators and judges are not constantly assaulted with accusations of plagiarism.

## VII. A BRIDGE TOO FAR: COURTS CRACK DOWN ON PLAGIARISM.

Plagiarism in litigation, however, is not without limits. Two examples of cases that are often cited in the plagiarism literature are *Iowa Supreme Court Attorney Disciplinary Board v. Cannon*<sup>125</sup> and *Lohan v. Perez*.<sup>126</sup> In *Cannon*, the Iowa Supreme Court agreed that a lawyer should be publicly reprimanded when his briefs used a law review article verbatim in 17 of 19 pages of one brief without attribution.<sup>127</sup> In the bankruptcy court proceeding out of which the lawyer’s unethical conduct arose, the lawyer had submitted two briefs.<sup>128</sup> Because the briefs were of “unusually high quality,” the court ordered the lawyer to certify that he was the author.<sup>129</sup> When the lawyer admitted that he “relied heavily” upon a law review article without attribution, the bankruptcy court initiated sanction proceedings.<sup>130</sup> At the hearing before the grievance commission, the lawyer testified that he did not intend to plagiarize but he was pressed for time and made the wrong decision to plagiarize large sections of the article.<sup>131</sup> After broadly defining plagiarism as a “misrepresentation,” the court also recognized that the term is “something of a scarlet letter that imposes a brand on a wide variety

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122. POSNER, *supra* note 111, at 15-20.

123. *Id.* at 20.

124. Joy & McMunigal, *supra* note 107.

125. 789 N.W.2d 756 (Iowa 2010).

126. 924 F. Supp. 2d 447 (E.D.N.Y. 2013).

127. 789 N.W.2d at 758, 760.

128. *Id.* at 757.

129. *Id.*

130. *Id.* at 758.

131. *Id.*

of behaviors.”<sup>132</sup> While it made clear that the ethical rules were not empowered to nab lawyers who merely fail to use adequate citation methods, those rules do prevent wholesale copying of 17 pages of material without attribution.<sup>133</sup>

Similarly, the United States District Court for the Eastern District of New York sanctioned a lawyer when the lawyer submitted an opposition to a motion to dismiss that was copied, without acknowledgement, from website articles and materials having nothing to do with the claims at issue.<sup>134</sup> The lawyer did not dispute the plagiarism accusations.<sup>135</sup> The court, however, denied the defendants’ request for costs and attorneys’ fees in defending the action, reasoning that the defendants failed to show any prejudice from the plagiarism or how the plagiarism caused additional fees to defend the claim.<sup>136</sup> Finding that the only victim of sanctionable misconduct was the justice system itself, the court ordered the lawyer to pay a \$1,500 fine.<sup>137</sup>

Therefore, based on these cases and others, there is a line that can be crossed. These cases seem to suggest that if a *substantial* amount of material is copied without attribution, and if those sources are secondary sources (both cases involved non-case authorities), unethical plagiarism has occurred.<sup>138</sup>

#### VIII. A KINDLIER, GENTLER APPROACH TO PLAGIARISM IN THE ACADEMIC SETTING.

Based on both the multi-cultural differences that may exist on plagiarism, as well as the limited concept of plagiarism as it applies in the world of litigation, teachers should not view the issue as one of a war on the students but instead should collaborate with students in the classroom setting to build trust around plagiarism.<sup>139</sup> Unfortunately, that attitude is not currently the prevailing one. In plagiarism literature, the term “battle” is the governing metaphor.<sup>140</sup> A brief survey of the literature also turns up negative

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132. *Id.* at 759.

133. *Id.*

134. *Lohan v. Perez*, 924 F. Supp. 2d 447, 459-61 (E.D.N.Y. 2013).

135. *Id.* at 460.

136. *Id.*

137. *Id.* at 461.

138. See Shatz & McGrath, *supra* note 105, at 17 (referencing an “implied distinction” between copying citable sources from outside the litigation context versus the copying of litigation-related material such as a brief).

139. See BAURAIN, *supra* note 68, at 132; Pennycook, *supra* note 20, at 226.

140. BAURAIN, *supra* note 68, at 124.

themes of “warfare, crime, punishment, detection, vigilant, violence, law enforcement, and disease.”<sup>141</sup> Plagiarism detection websites “operate on a presumption of guilt and essentially require students to prove their innocence.”<sup>142</sup> This attitude creates a false red line between “good” and “bad” students, which is too simplistic.<sup>143</sup>

Instead, as a first step, teachers should educate themselves about the complexity of such issues, instead of approaching the issue from a stance of moral superiority.<sup>144</sup> Second, students need to be educated not only about what plagiarism is in the academic context but what it means as a lawyer. After all, “the tensions and paradoxes built into academic writing in English [much less legal writing] are daunting for any student but particularly for those working to master difficult conventions in a new language and new sociocultural contexts.”<sup>145</sup> As one example, it must be confusing for any student, especially an international student, to be told to rely on precedent and use the courts’ words when it comes to legal theories, but at the same time tell them that they cannot violate an honor code by copying anything. Third, the teacher should operate from a position of trust and collaborate with the student, so that instead of an us versus them approach (teacher versus student), the position should be us (the teacher and the student) versus the issue of understanding and preventing plagiarism. Treat the situation like a collaborative lawyer would, and resolve disputes by removing the disputed matter from the court room (or ethics panel) and treat the process as a way to trouble shoot and problem solve rather than to fight and win. Finally, we as teachers need to model good ethics around plagiarism by giving credit where credit is due, whether by using PowerPoints, hypotheticals, or other materials. Our actions speak louder than our words.

## IX. CONCLUSION.

In conclusion, there is evidence on both sides of the issue of whether cross-cultural differences exist on plagiarism. All sides also agree that individual differences exist, but some authors find that making observations about patterns that do exist help in understanding the issue. Educators can be more effective if they understand that there might be an issue without stereotyping students into one category or another. Law school professors should

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141. *Id.*

142. *Id.* at 125.

143. *Id.*

144. Pennycook, *supra* note 20, at 226.

145. BAURAIN, *supra* note 68, at 125.

also be mindful of the world that exists beyond the academic context where plagiarism is tolerated in many different contexts. Finally, teachers should be collaborating with students instead of plotting against them to achieve what should be a mutually desirable goal of avoiding plagiarism.

# Allowing Autistic Academics the Freedom to Be Autistic: The ADA and a Neurodiverse Future in Pennsylvania and Beyond

By Brandon Stump\*

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## I. INTRODUCTION

“In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced.”<sup>1</sup>

Given Autism’s various social impediments, outside of any sensory issues at the workplace, it is not surprising that “[a]utistic adults may very well be the most disadvantaged disability group in the American workplace. Only [fourteen] percent of adults with autism held paid jobs in their communities . . . .”<sup>2</sup> Autism is a lifelong, immutable and incurable neurological condition which begins to socially and developmentally present symptoms/differences in the developmental stages of childhood.<sup>3</sup> In other words,

it is a neurodevelopmental disorder that affects behavioral, social and cognitive life skills. It is a spectrum disorder, which means that one or all of these areas can be affected in a mild or severe way. For this reason the same diagnosis can easily include people with very different abilities and limitations, being for instance highly intelligent and verbally proficient, but socially and emotionally helpless, or incapable of communicating effectively, and in need of assistance for every daily personal need.<sup>4</sup>

While Ripamonti’s explanation of Autism is satisfactory, readers must fully grasp the spectral nature of Autism. As noted by online

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1. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990).

2. Sarah Carr, *The Tricky Path to Employment Is Trickier When You’re Autistic*, SLATE MAG. (Sept. 22, 2017, 5:50 AM), [http://www.slate.com/articles/business/moneybox/2017/09/how\\_autism\\_complicates\\_the\\_path\\_to\\_employment.html](http://www.slate.com/articles/business/moneybox/2017/09/how_autism_complicates_the_path_to_employment.html).

3. See Lidia Ripamonti, *Disability, Diversity, and Autism: Philosophical Perspectives on Health*, 22 NEW BIOETHICS 56, 58 (2016).

4. *Id.* at 58. While this Author takes issue with Ripamonti’s use of the term “helpless,” as it connotes a lack of autonomy over the social and emotional lives of Autistics, this definition is one of the most comprehensive definitions of a spectrum condition that this Author has ever read. For that reason, I have included it to illustrate to the neuromajority (non-Autistic) the variation and diversity within the Autistic community.

magazine *Verywell Health*: “Confusingly, [one] can also have a combination of mild and severe symptoms. For example, it is possible to be very intelligent and verbal but also have severe symptoms of anxiety and sensory dysfunction.”<sup>5</sup> These “symptoms” exist on a spectrum from mild to severe and present differently in each Autistic.<sup>6</sup>

What does this spectrum look like? While some Autistics, approximately thirty percent, never speak and, instead, communicate with sign language, visual tools, and technology, others learn to speak very early (the other end of the spectrum).<sup>7</sup> Some Autistics will meet all developmental milestones without delay and be of quite average intellect.<sup>8</sup> Like the world at large, Autistics have varying interests, skills, IQs, social abilities, etc. The spectrum is so wide, “no two people with the same diagnosis will present the same profile.”<sup>9</sup> This Article will narrow the community of Autistics down to the still overly broad concept of “high functioning Autistics,”<sup>10</sup> of

5. Lisa Jo Rudy, *An Overview of Autism*, VERYWELLHEALTH (Feb. 21, 2018), <https://www.verywellhealth.com/autism-4014759>.

6. *Id.* Additionally, I, as an Autistic, employ identity-first language, rather than person-first language because my neurology, my Autism, influences everything about my life from the music I like to the professions I choose. For an excellent discussion on the semantic power of disability identifiers, see *Identity-First Language*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/about-asan/identity-first-language/>.

In the autism community, many self-advocates and their allies prefer terminology such as ‘Autistic,’ ‘Autistic person,’ or ‘Autistic individual’ because we understand autism as an inherent part of an individual’s identity—the same way one refers to ‘Muslims,’ ‘African-Americans,’ ‘Lesbian/Gay/Bisexual/Transgender/Queer,’ ‘Chinese,’ ‘gifted,’ ‘athletic,’ or ‘Jewish.’ On the other hand, many parents of Autistic people and professionals who work with Autistic people prefer terminology such as ‘person with autism,’ ‘people with autism,’ or ‘individual with ASD’ because they do not consider autism to be part of an individual’s identity and do not want their children to be identified or referred to as ‘Autistic.’ They want ‘person-first language,’ that puts ‘person’ before any identifier such as ‘autism,’ in order to emphasize the humanity of their children.

*Id.*

7. Lisa Jo Rudy, *Overview of Nonverbal Autism*, VERYWELLHEALTH (Jan. 17, 2019), <https://www.verywellhealth.com/what-is-nonverbal-autism-260032>. I also note, as does Rudy, “Late language acquisition is not necessarily an indication of low IQ or poor prognosis.” *Id.* Regarding early speech, see Lynne Soraya, *What Does It Mean to Have Asperger Syndrome?*, PSYCHOL. TODAY (Apr. 13, 2008), <https://www.psychologytoday.com/us/blog/aspergers-diary/200804/what-does-it-mean-have-asperger-syndrome> (noting that some Autistics speak early rather than late).

8. Ripamonti, *supra* note 3, at 58.

9. *Id.* at 57.

10. I do not endorse the concept of ability levels within the Autistic community because I do not believe ability can or should be measured by one’s masking of symptoms, setbacks, or differences, nor do I think that ability level should be based on verbal communication or one’s ability to fit or defy stereotypes. However, for purposes of this Article, high functioning Autistics are those Autistics who have the cognitive ability and IQ to work in higher education. See Jessica Flynn, *Why Autism Functioning Labels Are Harmful—and What to Say Instead*, MIGHTY (July 22, 2018), <https://themighty.com/2018/07/autism-functioning-labels-low->



which I am a member, who are characteristically considered to be of “average, or above average, intelligence, along with very restricted and repetitive behaviors and interests, and lack of delay in language acquisition.”<sup>11</sup>

This Article focuses on those Autistics who have the ability, in terms of intellect credential, and measurable skill, to enter the workplace. In particular, this Article addresses Autistics who are academics and teach at the collegiate level, specifically in the American legal classroom. I have chosen a narrow subset of a broad community to make a targeted argument for employment protection which can help expand the law for the entire Autistic community. While we are different than neurotypically developed persons, “[m]any with [Autism Spectrum Disorder (ASD)] have a high attention to detail and the ability to sustain intense concentration in their areas of interest.”<sup>12</sup> Thus, we are ideal candidates for jobs in academia.

I am Autistic and an adjunct professor of legal writing at Duquesne University School of Law. Like critical race and feminist scholars before me have used personal narratives to develop records and examples of relationships between race, gender, power, oppression, and the law, I employ both the “I” perspective and the use of personal narrative to develop an understanding of Autism in the legal academy.<sup>13</sup> When we are represented with narrative, we exist in the minds of the collective. What I write about is not just my journey, which includes both great accomplishment and intellect as well as painful setbacks and roadblocks all stemming from my neurology, but also about the journey of approximately one to two percent of the entire world’s population.<sup>14</sup> Those of us drawn to academia tend to do so because of our lifelong and intense interests in certain subjects, as well as our ability to “work alone with a high degree of autonomy in a clearly defined and intellectually challenging job.”<sup>15</sup> A job in the academy “make[s] good use of [our] logic and

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functioning-high-functioning/ (discussing how labeling Autistics as “high functioning” de-means the legitimate struggles of those Autistics and assumes inability level of less neurotypically presenting Autistics).

11. Ripamonti, *supra* note 3, at 58.

12. Wendy F. Hensel, *People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier*, 52 HAR. C.R.-C.L. L. REV. 73, 77 (2017).

13. See generally Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997); Harris, *supra* note 1, at 581.

14. *Autism Spectrum Disorder Data and Statistics*, CENTERS FOR DISEASE CONTROL & PREVENTION (Sept. 11, 2018), <https://www.cdc.gov/ncbddd/autism/data.html> (“Studies in Asia, Europe, and North America have identified individuals with ASD with an average prevalence of between 1% and 2%.”).

15. Hensel, *supra* note 12, at 79.

analytical skills, excellent memory for facts, vast knowledge of specialized fields, tolerance of routine, and creative problem solving.”<sup>16</sup> The job of professor, though, does not end with a deep fascination for bodies of work or facts, nor is the struggle to socially acclimate resolved simply by having a routine schedule and obvious objectives.

Autism is not just a lifelong condition; it is a full body experience. Autistics, as a group, are known for being extremely sensitive to “environmental stimuli, including sound, touch, and smell.”<sup>17</sup> A boss who likes to rub employees’ shoulders, fluorescent lighting in the classroom, students’ whispers during class instruction, smells of various microwaved meals in the office kitchen, the inability to control the temperature – either hot or cold, can all make the work-day unbearable for an Autistic. Aside from the surrounding environment, Autistic bodies must interact with other bodies in order to be part of the workforce. “Although each individual is unique, it is common for individuals with autism to lack the ability to interpret social cues or to fully understand the thoughts and feelings of others, leading to misunderstandings about . . . [the] nuances in verbal communication.”<sup>18</sup>

Imagine every day when you arrive to work, your colleagues want to engage. However, it takes you hours to acclimate to the change from sleep to consciousness, so the idea of speaking with colleagues and being congenial only hours after waking up can be both painful and debilitating. Add to this that your colleagues only ever want to discuss sports or the newest fad in television. You might only like to talk about the comic books you are currently reading or the Australian melodrama you binge watch at night, and because your interests are so limited, it is very difficult to engage with others. If you do decide to talk about the nuances of a fictional Australian town and the various subplots of your melodrama (no pun intended), you may be doing so “without regard to whether anyone else is interested, thereby annoying [students] and colleagues.”<sup>19</sup>

Furthermore, many Autistics can be “very literal and have difficulty understanding the subtext of conversations.”<sup>20</sup> Imagine you arrive at a meeting with your supervisor who asks you to stay in his office and explains that he will be “right back.” You are uncertain

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16. *Id.*

17. *Id.*

18. *Id.* at 78.

19. *Id.* Notice how the Autistic person is expected to deal with the interests of those around her/him.

20. *Id.*

what “right back” means. He does not return, as he is caught up in something else that happened. Rather than returning to your office to work on your lesson plan, you sit in the supervisor’s office for two hours, afraid that he might be “right back” and you do not want to be in trouble. Or imagine that you infuse your class with comedy, but much of your sense of humor involves seriously and blandly stating absurdities. For example, a student asks if they should print an assignment, which the syllabus clearly states is required, and the Autistic professor responds, “It is always a good idea to not follow the syllabus.” To the Autistic academic, the absurdity of the statement makes it funny. Months later, the professor discovers in course evaluations that students struggled to know when the professor was serious.

Every example here can directly impact one’s ability to remain employed at their respective university, a fact that is even more true for Autistic adjuncts who lack tenure protections. Employment is a concern across the Autism spectrum; in fact, employment is “the single biggest issue or barrier facing” Autistics.<sup>21</sup> Given the inherent difficulties of navigating a system designed for the neuromajority,<sup>22</sup> Autistic academics will inevitably find themselves in difficult social situations with students, faculty, administrative staff, IT personnel, maintenance workers, and others on campus. We will be tasked by being the only, or one of the only, neurodivergent people at our workplaces. Without any ill motive,<sup>23</sup> an Autistic academic can find oneself in disputes that our neurotypical coworkers can

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21. *Id.* at 75 (quoting JUDITH BARNARD ET AL., *IGNORED OR INELIGIBLE? THE REALITY FOR ADULTS WITH AUTISM SPECTRUM DISORDERS* 18 (2001) (study conducted in the United Kingdom)).

22. Throughout this Article, I use “neuro” as a prefix in order to exemplify that the world for an Autistic, whose neurochemistry makes them neurodivergent from the neuromajority, is fundamentally different. For a personal approach to neurodiversity, see Andrew Solender, *Neurodivergence—Celebrating Autism Awareness*, PSYCHOL. TODAY (May 30, 2017), <https://www.psychologytoday.com/us/blog/the-intelligent-divorce/201705/neurodivergence>. Solender, who has Asperger’s, explains his place on the spectrum as follows:

Imagine that everybody’s mind is a bucket, and the more weight in this bucket, the harder it is for them to communicate with others. Each Asperger’s behavior is a rock. When there is one rock in the bucket, it is a little off balance, but the weight is manageable. However, somebody with Asperger’s does not have just one rock, but more likely five or six which heavily restricts their ability to communicate.

*Id.*

23. I do not mean to imply that Autistics are unable to manifest ill motive; however, for purposes of this Article, I focus on the social/behavioral differences that Autistics encounter which can lead to adverse employment actions that are directly related to their neurotype, alone.

avoid just by having different brain chemistry.<sup>24</sup> This Article is intended to help colleges, universities, and Autistic faculty (with a specific emphasis on law schools) to understand what their rights are and should be. First, this Article addresses the discriminatory and illogical impact of requiring Autistic professors to self-disclose their Autism in order to receive employment protections. While the Americans with Disabilities Act (ADA)/Americans with Disabilities Amendments Act (ADAA),<sup>25</sup> as well as the Pennsylvania Human Relations Act (PHRA),<sup>26</sup> typically require disabled persons to inform their employers of their disability in order to accommodate the disability, I contend that requiring an Autistic professor with social differences to disclose their Autism to specific personnel is antithetical to the nature of Autism. Instead, I contend that given the cluster of behaviors and traits associated with Autism, any Autistic academic will most likely be regarded as having a disability, pursuant to the ADA, and should be able to avoid the hurdles posed by self-disclosure as a person with a qualifying disability. Lastly, this Article addresses the concept of “accommodating” an Autistic personality in the academy. In other words, I examine the idea that an Autistic person might never fathom that their personhood, inseparable from their Autistic neurology, could lead to termination, failure to advance, or the failure to have a contract renewed. Rather than seeking an accommodation for Autistic behaviors and personalities, courts, schools, and litigants should ask a simple question: Do the behaviors of this Autistic professor impact their ability to perform the job, with or without a reasonable accommodation? If the professor’s quirks, actions, reactions, language, etc. do not hinder their ability to perform their job, and a school administration’s decision is based on concepts of congeniality, the Autistic professor—given their immutable characteristics—is ultimately being discriminated against for being Autistic. Courts and college administrations must begin to accept that there is no separation between Autistic behaviors and Autism itself.

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24. Jennifer Malia, *I'm an Autistic Woman, and This Is How I Navigate the Workplace*, GLAMOUR (Sept. 26, 2017), <https://www.glamour.com/story/im-an-autistic-woman-and-this-is-how-i-navigate-the-workplace>. Malia discusses her experiences as an Autistic woman who works as a professor. Malia describes how she can have meltdowns at work: “Usually, the inciting incident that sets a meltdown in motion doesn’t seem significant enough to cause an intense emotional reaction. For example, any unexpected disruption to my routine like a change to my teaching schedule can be the straw that breaks the camel’s back.” *Id.*

25. 42 U.S.C. § 12112 (2009).

26. 43 PA. CONS. STAT. § 955 (1997).

## II. TEACHING WHILE AUTISTIC: SELF-ACCOMMODATION AND THE ADA

When I am alone, or in a comfortable setting like my home with my wife and dogs, my life as an Autistic person is both navigable and enjoyable. My wife is fine with minimal and sporadic eye contact and has never asked me to look her in the eye<sup>27</sup> in the ten years we have been together. I ensure that I have a hot and cold beverage at all times. I pace the hall and place my face against the glass of my front door, looking out to the street, whenever I need a break or am trying to process my plans for the day. I never go outside of the house if I hear the neighbors about, unless it is absolutely required, so as to eliminate any unexpected social activity. I always sit on the same sides of each couch. I use one living room for television viewing and magazine reading. I use the more formal living room for reading novels and comic books. I have either a fan or access to white noise in each room so I can tune out any extra noise, which interferes with my concentration. In my home, or at a coffee shop that I frequent routinely while wearing noise-cancelling headphones, I can grade and evaluate student papers for hours, giving scrupulous notes and feedback. I also send students e-mails, explaining the key details of the week – the various expectations, any changes in deadlines, specific considerations I would like them to make. Left to my own devices, I do quite well. One does not need the ADA to navigate home life nor the more autonomous parts of academia.

But everything changes for me, and other Autistics similarly situated, when we go to work. In full disclosure, I'm hyper verbal, having learned to speak at six-months old, and I taught myself to read before kindergarten. A math and science Autistic, I am not. I will not be asked to Silicon Valley to add strings of numbers and words together, helping to create the next great advancement in technology. It is sometimes difficult for neurotypicals, who are also the gatekeepers to what legal protections I, as a person with a disability, am entitled, to conceptualize how Autistics like me are in fact Autistic.<sup>28</sup> A former student to whom I disclosed my status after our class ended said, "I thought you were eccentric, a person who

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27. See Hensel, *supra* note 12, at 78.

28. Consider this: An Autistic person cannot be medically Autistic until a doctor diagnoses them as Autistic. See THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 299.00 (F84.0) [hereinafter DSM-5] (5th ed. 2013). Given the low percentage of Autistics in the world-at-large, the odds are extremely low that an Autistic person would be diagnosed by an Autistic doctor. Furthermore, whether the ADA applies to any given employment matter is a consideration left to neurotypical attorneys and judges. In other words, my very

didn't seem concerned with society at large or how it perceived you." Other students who know I am Autistic have not been surprised, noticing that everything from how I navigate space—often tripping and running into things that most in the class would never bump into, as their spatial reasoning is more acute and better designed for a world where falling over the legs of a chalkboard or tripping over the same student backpack four times in one fifty minute class are strange behaviors.<sup>29</sup> Many of my students note that I rarely make eye contact, and they notice that any loud noises or unexpected questions can erase my memory and train-of-thought (what I call "Etch-A-Sketch Brain"—the interruption shaking the previous picture erased). They also remark that my sense of humor is different than theirs, my delivery often dry and serious, less about jokes than societal or interpersonal observations that I find confounding, illogical, or humorous. Because I struggle with interpreting facial expressions and body language, looking out at a classroom of students who all seem to be making different faces and moving their arms and shoulders while sighing or slumping, I frequently ask students if they need anything, if they are confused, or if they are ready to move on. In many ways, I accommodate myself. I hold conferences either on weekends or in our empty classroom after class ends rather than the adjunct office in the busy legal writing center where background noise and conversation are overwhelming to my focus. I turn off half of the fluorescent lights so my eyes do not burn during teaching.

But there is one thing Autistics like myself cannot accommodate on our own, even in environments like colleges and universities where professional autonomy affords us tremendous freedom and latitude to be ourselves – our various personalities and behaviors that are directly related to and influenced by our neurology are not always compatible with specific social expectations.<sup>30</sup> This Article will present a revolutionary thought: Most Autistics I know, including myself, desire only the freedom to meet necessary job requirements while being ourselves. In other words, we seek an accommodation to be neurologically other – quirky, overly friendly or cold at

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real disability and the protections I am afforded because of it are decided by thousands of people who lack my brain chemistry.

29. Robyn Steward, *Lesser-Known Things About Asperger's Syndrome*, BBC NEWS: OUCH BLOG (Aug. 16, 2014), <https://www.bbc.com/news/blogs-ouch-28746359> (providing examples of typical difficulties for those with Asperger's including "[l]imits to body awareness, for example walking round obstacles or carrying out fine motor tasks").

30. It is difficult to find case law regarding Autistics in white-collar or academic jobs bringing suit under the ADA; however, numerous cases regarding other forms of employment and Autism will be used to construct this argument.

times, uniquely dressed, etc. without the fear of reprimand or termination for existing as Autistic while teaching.

### III. THE BURDEN OF DISCLOSING FOR NEURODIVERGENT PERSONS WITH SOCIAL DIFFERENCES

In the workplace, traditional means of protection for disabled persons are governed federally by the ADA/ADAA,<sup>31</sup> and by the PHRA in Pennsylvania,<sup>32</sup> which both provide that one is protected from workplace discrimination/adverse employment actions if the person has a “disability” that “substantially limits” them in a major life function.<sup>33</sup> Updated regulations from the Equal Employment Opportunity Commission (EEOC) provide that Autism is “almost always covered” because “[a]n impairment is a disability . . . if it substantially limits the ability . . . to perform a major life activity as compared to most people in the general population[.]” and Autism is considered to “substantially [limit] brain function.”<sup>34</sup> Furthermore, “substantially limits” “shall be construed broadly in favor of expansive coverage” under the ADA and that “major life activities” include “thinking, communicating, interacting with others, and working.”<sup>35</sup> As defined by the ADA/ADAA, a “disability” includes, but is not limited to, “(A) a physical or mental impairment that substantially limits one or more major life activities of such individuals” and “(C) being regarded as having such an impairment.”<sup>36</sup>

In Pennsylvania,<sup>37</sup> “in order to make out a prima facie case of disability discrimination under the ADA and PHRA, a plaintiff must establish that s/he (1) has a ‘disability,’ (2) is a ‘qualified individual,’ and (3) has suffered an adverse employment action because of that disability.”<sup>38</sup> Additionally,

[t]he jurisprudence regarding disability discrimination can be found in the Americans With Disabilities Act (ADA) and the

31. 42 U.S.C. § 12102(1) (2012).

32. 43 PA. CONS. STAT. § 955 (1997); 43 PA. CONS. STAT. § 954 (p.1)(1)-(3) (1997).

33. 42 U.S.C. § 12102(1); 43 PA. CONS. STAT. § 954 (p.1)(1)-(3).

34. 29 C.F.R. § 1630.2(j)(1)(ii), (3)(iii) (2012).

35. 29 C.F.R. § 1630.2(j)(1)(i), (i)(1)(i).

36. 42 U.S.C. § 12102(1)(A), (C).

37. Because the DUQUESNE LAW REVIEW is located in Pittsburgh, Pennsylvania, I have chosen to discuss relevant case law, whenever possible, from either Pennsylvania or the Third Circuit Court of Appeals. However, outside jurisdictions offer examples for how Pennsylvania and the Third Circuit should proceed.

38. *Becknauld v. Commonwealth Dep’t of Agric.*, No. 678 C.D. 2016, 2017 WL 33732, at \*1 (Pa. Commw. Ct. Jan. 4, 2017) (quoting *Buskirk v. Apollo Metals*, 307 F.3d 160, 166 (3d Cir. 2002)). Additionally, the PHRA is interpreted “in line with the ADA.” *Khula v. State Corr. Inst.-Somerset*, 145 A.3d 1209, 1212 (Pa. Commw. Ct. 2016).

Pennsylvania Human Relations Act. Within the context of employment discrimination involving persons with a disability, it is somewhat intuitive that if a person wants and/or needs a reasonable accommodation to successfully perform a job, one must first have a disability, one must then inform the employer of the existence of the disability, and to the extent that one wants/needs a reasonable accommodation related to the disability, one should request a reasonable accommodation.<sup>39</sup>

It seems intuitive that one who has an Autism diagnosis would have no problem proving she was legally entitled to protection from discrimination; however, the ADA/ADAA and PHRA treat disability not as “identity,” an inherent and critical part of one’s existence, but something which must be acknowledged and “known” by the employer in order for the disabled employee to receive protection.<sup>40</sup> The EEOC’s Compliance Manual, in fact, stresses that legally cognizable issues of discrimination only come into play “because of the *known* disability of an individual,” and reasonable accommodations under the ADA are only required for “*known* physical or mental limitations of an otherwise qualified individual.”<sup>41</sup>

Though not about an Autistic worker, in *Allen v. State Civil Service Commission*, the Commonwealth Court of Pennsylvania reasoned that a woman claiming she was denied a reasonable accommodation was required to show she “informed her employer that she had a [specific/certain] disability” and that “she desired a reasonable accommodation.”<sup>42</sup> The petitioner in *Allen* “indicated to her instructor and the training coordinator, that she could not do the required [workplace training] scenarios on the day in question because she was sick and she did not feel well.”<sup>43</sup> The employer informed the petitioner that she would have to retake the test (complete the “scenarios”) at a later date, and the petitioner responded, “okay.”<sup>44</sup> However, the petitioner was not agreeable to the accommodation of retesting, despite her previous verbalization of “okay.”<sup>45</sup> Ultimately, the Commonwealth Court concluded that based on the pleadings, the petitioner only claimed she had “a disability” in general, and provided no facts to substantiate or specifically explain what her disability was and how her specific disability

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39. *Allen v. State Civil Serv. Comm’n*, 992 A.2d 924, 931 (Pa. Commw. Ct. 2010).

40. *Id.* at 931-32.

41. 42 U.S.C. § 12112(b)(4) (emphasis added), (5)(A) (2012) (emphasis added).

42. 992 A.2d at 932.

43. *Id.*

44. *Id.*

45. *Id.*



limited her ability to perform the required training.<sup>46</sup> Thus, the petitioner did not satisfy the ADA's requirement that she had an employer "known" disability.<sup>47</sup> The *Allen* court also explained that pursuant to 42 U.S.C. § 12112(b)(5)(A), which requires an employer to provide a reasonable accommodation for "known physical or mental limitations,"<sup>48</sup> the employer must "know of both the disability and desire for an accommodation" in order to be held liable.<sup>49</sup>

At first read, *Allen* seems harmless and innocuous, but for Autistics and other neurodivergent employees, the decision could mean the difference between protection/employment and no protection/unemployment, unless the Autistic employee is "regarded as" Autistic,<sup>50</sup> discussed *infra*. The petitioner in *Allen*, though her claim failed because she admitted she received an "accommodation" to take her test on a later date, did affirmatively tell her employer she was "sick."<sup>51</sup> While "sick" is admittedly a general term, the petitioner's employer was on notice that she was in need of an accommodation. Also, the *Allen* court cited specific language from the Third Circuit Court of Appeals which explained:

What matters under the ADA are not formalisms about the manner of the request [for reasonable accommodation], but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.<sup>52</sup>

Unfortunately, the *Allen* court never evaluates where the petitioner's explanation that she did not "feel well" and that she was "sick" fell on a spectrum (pun intended) between failure to establish a known disability and "*enough information . . . under the circumstances.*"<sup>53</sup>

The answer to this question is especially important to employed Autistics. In order to obtain the protection of a law created for people like us, Autistics must, despite our diagnosed social challenges

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46. *Id.* at 933.

47. *Id.*

48. *Id.* at 931 (quoting 42 U.S.C. § 12112(b)(5)(A)).

49. *Id.* at 932 (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)).

50. *See id.* at 933.

51. *Id.* at 932.

52. *Id.* (alteration in original) (quoting *Phoenixville*, 184 F.3d at 313).

53. *Id.* at 931-33 (quoting *Phoenixville*, 184 F.3d at 313).

and differences, “inform the employer of the existence of the disability.”<sup>54</sup> And pursuant to *Allen*, we must inform them specifically. I contend that such a coming-out moment for Autistic employees might not be as clear-cut as most neurotypical employers/supervisors would imagine. What if the pressure of disclosing a little understood, highly stereotyped neurological difference which impacts socialization—everything from small talk in the office, shared interests with coworkers, and the ability to find the appropriate human resources director to disclose their Autism—is an insurmountable burden for the Autistic professor?<sup>55</sup> After all, “[b]eing able to successfully navigate the social nuances and relationships that exist within a workplace setting is often more critical to career success and advancement than the mastery of hard skills. Because ASD is primarily a social disorder, it can create serious hurdles to securing and maintaining employment.”<sup>56</sup> How, then, can the law require specific, acute self-disclosure if the inability for self-disclosure, or the limitations surrounding such disclosure, are manifestations of Autism? In fact, this type of pro-active and self-exposing requirement runs counterintuitive to all evidence we have about what it means to be Autistic.<sup>57</sup>

Basically, *Allen* requires that those with neurodivergent social perception and abilities must navigate a social system in order to obtain protections.<sup>58</sup> However, the social skills of an Autistic person are so different from those of a neurotypical person that medical experts recommend that young Autistics find a social training partner who helps the young Autistic to learn social cues, appropriate topics of conversation, a conceptualization of theory of mind (the

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54. *Id.* at 931; *see also* ASPERGER SYNDROME: ASSESSING AND TREATING HIGH-FUNCTIONING AUTISM SPECTRUM DISORDERS 376 (James C. McPartland et al. eds., Guildford Press 2d ed. 2014) [hereinafter ASPERGER SYNDROME].

55. Hensel, *supra* note 12, at 90 (“[T]he ADA’s strict confidentiality requirements may impede disclosure in some circumstances. Although the employee has the ability to self-disclose at any time to anyone in the workplace, many employees with ASD may choose to remain silent once the position is secured.”). Additionally, as a point of self-disclosure, in the past my social anxieties have burdened me to such a degree that pursuing human resources personnel has been all but impossible.

56. *Id.* at 78.

57. It bears repeating: “[F]irst, . . . all people on the spectrum have issues with social interactions. They do so due to the atypical neurological wiring of their brains relative to the average person, which leads to an impoverished ability to intuitively read between the lines and comprehend nonverbal communication.” Ugo Uche, *Why Is ASD Often Associated with Social Anxiety?*, PSYCHOL. TODAY (June 29, 2017), <https://www.psychologytoday.com/us/blog/promoting-empathy-your-teen/201706/why-is-asd-often-associated-social-anxiety>. In turn, these limitations and differences often lead to social anxieties which compound Autism’s symptoms. *See id.*

58. ASPERGER SYNDROME, *supra* note 54, at 19.

idea that other people have thoughts different from the Autistic person), etc.<sup>59</sup> In fact, “[w]hen an individual has difficulty predicting the actions of social partners, the development of social communication and emotional regulation can be compromised.”<sup>60</sup> Nonetheless, in order to be legally protected from workplace discrimination on the basis of disability or to be accommodated at the workplace, Autistics have to do something that at times can be nearly impossible for an Autistic to accomplish—no matter how socially adept the outside world might judge them.

However, there is some hope for Autistic academics if they have reported their various *limitations* to their employers. In *Lazer Spot, Inc. v. Human Relations Commission*, the Commonwealth Court of Pennsylvania examined Matthew Harrison’s claim that PTSD interfered with his major life activities of sleeping and working.<sup>61</sup> The parties did not dispute Harrison’s PTSD diagnosis; in fact, “the record reveal[ed] that Harrison presented extensive evidence concerning the effect of his PTSD on his sleeping. However, Harrison did not offer any evidence to prove that [his employer] was aware of [his] limitations [with regard to sleeping.]”<sup>62</sup> While there was substantial evidence that Harrison’s PTSD impacted his sleep, the court held that “it is important to distinguish between an employer’s knowledge of an employee’s disability versus an employer’s knowledge of any limitations experienced by the employee as a result of that disability.”<sup>63</sup> Relying on regulations from the EEOC, the court quoted, “The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the individual.”<sup>64</sup>

While *Lazer Spot* is unpublished, and thus nonbinding, the decision reflects the Commonwealth Court of Pennsylvania’s impetus to move away from *Allen*’s rigid requirement of specific disclosure toward a fairer reading of the ADA—one that does not unintentionally disenfranchise its intended plaintiffs.<sup>65</sup> The *Lazer Spot* court even cited the *Allen* “known disability” requirement while reaching its more liberal conclusion.<sup>66</sup> Thus, it seems that in Pennsylvania

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59. *Id.* at 180.

60. *Id.* at 181.

61. *Lazer Spot, Inc. v. Human Relations Comm’n.*, No. 459 C.D. 2017, 2018 WL 670621, at \*3 (Pa. Commw. Ct. Feb. 2, 2018).

62. *Id.* at \*5.

63. *Id.* (quoting *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 164 (5th Cir. 1996)).

64. *Id.* (quoting 29 C.F.R. § 1630.2(j) (1995)).

65. *See id.*

66. *Id.* at \*9.

an Autistic professor could establish that her employer regarded her as Autistic if she can prove that the employer was aware of her limitations and social differences, rather than relying on the specific incantation spoken or written to the correct human resources personnel: "I am Autistic."

#### IV. ACCEPTING US FOR WHO WE ARE: THE LINK BETWEEN AUTISTIC BEHAVIORS AND "REGARDED AS" PROTECTION

Instead of requiring self-disclosure, I contend that Autistics, because of Autistic behavior, should always be protected by the ADA, even when they never overtly claimed their status or professed various limitations to their employer. This is especially important for Autistic professors who are evaluated by both colleagues and students, both of whom could be ignorant to the professor's limitations or diagnosis because the professor never fathomed she would need any type of protection for simply being herself. For neurotypicals reading this article, ask yourselves if you have ever had to disclose all of your various personality traits to your employers and coworkers. Until one is shown or told that she is different, she has little reason to believe that she must disclose her various differences, quirks, and aberrations from the neuromajority, to her supervisors and classroom of students—just to be protected by the ADA. I contend that if a professor behaves in such a manner that her humor, bluntness, or all-around quirks inform any hiring, firing, or non-renewal of contracts, that professor should be entitled to ADA protections based on the theory that she was either "regarded as" or should have been regarded as Autistic.

Both Pennsylvania's PHRC and the ADA/ADAA provide guidance on this issue. Section 44.4(ii)(D) of the PHRC's regulations provides that "regarded as having an impairment" means:

ha[ving] a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator or provider of a public accommodation as constituting a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or has none of the impairments defined in subparagraph (i)(A) but is treated by an employer or owner, operator or provider of a public accommodation as having an impairment.<sup>67</sup>

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67. 16 PA. CODE § 44.4(ii)(D) (2018).

Additionally, 42 U.S.C. § 12102(3)(A) of the ADA provides:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Lastly, the court in *Lazer Spot* explained:

An individual rejected from a job because of the “myths, fears and stereotypes” associated with disabilities would be covered under this part of the definition of disability, whether or not the employer’s or other covered entity’s perception were shared by others in the field and whether or not the individual’s actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers’ compensation costs, and acceptance by coworkers and customers.<sup>68</sup>

In *Lazer Spot*, the instructional decision discussed *supra*, Harrison told his employer that he had PTSD and was afraid he would be triggered if he had to drive a truck outside of the yard.<sup>69</sup> Harrison’s employer, a big-rig truck company, interpreted Harrison’s admission of his PTSD diagnosis to mean that Harrison could not drive an 18-wheeler anywhere, as he was a safety risk to the company.<sup>70</sup> Applying all of these regulations, the court in *Lazer Spot* concluded that because the employer regarded Harrison as disabled and made a decision to terminate his employment as a truck driver within the yard based on the stereotypes and myths of PTSD, Harrison could bring a “regarded as” claim.<sup>71</sup>

Accordingly, the holding in *Lazer Spot* will help any Autistic professor who mentions his neurodivergence and is, in turn, viewed by administration and colleagues as disabled. But what if the Autistic

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68. *Lazer Spot*, 2018 WL 670621, at \*7 (quoting *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1132 (10th Cir. 2003)).

69. *Id.* at \*9.

70. *Id.*

71. *Id.*

professor never mentions his Autism? What if his behaviors, mannerisms, way of being in the world speak for themselves? Though Pennsylvania does not have any cases directly on point, the Eleventh Circuit Court of Appeals and the United States District Court for the Southern District of New York have addressed circumstances where Autistic people, even without ever declaring their Autism, presented issues of fact because the ADA/ADAA protects against discrimination for “odd”<sup>72</sup> behaviors that either did or should have informed the employer of the employee’s Autism.

*A. Awkward and Earnest Socialization in the Eleventh Circuit*

In *Taylor v. Food World, Inc.*, Gary, an Autistic man (diagnosed with Asperger’s) who engaged in repetitive and loud speech, as well as making “inappropriate comments” and asking “personal questions of strangers,” worked as a clerk at a grocery store.<sup>73</sup> His primary duties included bagging groceries and delivering customers’ groceries to their vehicles.<sup>74</sup> Three customers complained to management regarding Gary’s behaviors.<sup>75</sup> Gary was terminated by his grocery store employer “based on customer complaints that Gary was loud, overly friendly, and overly talkative.”<sup>76</sup> Gary admitted “that he inquired as to whether couples were married and as to the ages and names of customers’ children. He testified that he once told a customer that she needed to buy more groceries because she was too skinny and that he asked a customer if there was anything wrong with his toilet [based on their purchases].”<sup>77</sup>

Gary sued the grocery store for firing him based on his Autism, and the grocery store did not contest that Gary had a “disability” under the ADA.<sup>78</sup> However, the grocery store did argue that Gary was not qualified for the job without a reasonable accommodation; thus, he could lawfully be terminated.<sup>79</sup> The district court ruled that Gary was not “an otherwise qualified individual” because “as a matter of law, Gary’s on-the-job behavior rendered him unqualified for the position of utility clerk.”<sup>80</sup>

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72. As an Autistic, I do not believe my behaviors, mannerisms, or socialization are odd, but I do acknowledge that my entire personhood is different from the neuromajoritarian presentation of behavior and socialization.

73. 133 F.3d 1419, 1421 (11th Cir. 1998).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1424.

78. *Id.* at 1422.

79. *Id.* at 1423.

80. *Id.*

The Eleventh Circuit Court of Appeals found that Gary's verbosity, invasive questions, and loud speech were undisputed facts.<sup>81</sup> However, the court also concluded that Gary was, arguably, able to perform the duties of a utility clerk.<sup>82</sup> The grocery store contended that because utility clerks were required to have customer contact, "interacting appropriately with customers" was an "essential job function."<sup>83</sup> Ultimately, even before the more favorable 2008 amendments to the ADA, the Eleventh Circuit held that Gary's case presented questions of fact as to whether Gary could perform the job without offending others and whether any of his behavior or commentary was actually "offensive."<sup>84</sup>

*B. Personal Space Issues and Stereotypical Meltdown Behavior in the Southern District of New York*

Additionally, in *Glaser v. Gap Inc.*, the United States District Court for the Southern District of New York examined an ADA claim of William Glaser, a man who worked in a Gap distribution center and was terminated after exhibiting stereotypical, Autistic meltdown behaviors.<sup>85</sup> Shortly before his termination, Glaser met with his supervisor to apologize for a misunderstanding; however, his supervisor began yelling at him.<sup>86</sup> While his supervisor was yelling, Glaser "was waving his hands and continually moving," blocking his supervisor's means of egress.<sup>87</sup> Other coworkers said Glaser clenched his fists and released his hands repeatedly.<sup>88</sup> Throughout his employment at Gap, Glaser also made some coworkers feel uncomfortable "by getting upset if [a coworker] was too busy to speak with him when he stopped by to see her and by talking about her to other people in too familiar a manner."<sup>89</sup> Concepts of personal space plagued Glaser's employment, and he was advised that he needed to stand farther away from people when talking and that he could not put his arm around his supervisor's shoulders.<sup>90</sup> One of the questions in Glaser's case was whether Gap

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81. *Id.* at 1423-24. The record also revealed that many customers believed Gary was drunk. *Id.* at 1424.

82. *Id.* at 1423-24.

83. *Id.* at 1424.

84. *Id.*

85. *Glaser v. Gap Inc.*, 994 F. Supp. 2d 569, 571 (S.D.N.Y. 2014).

86. *Id.* at 571.

87. *Id.*

88. *Id.*

89. *Id.* at 575.

90. *Id.*

had notice of his disability.<sup>91</sup> A trainer with Gap testified that when Glaser “would get upset, he would turn red, tense up, clenching his fists against his chest, and tremble.”<sup>92</sup> The district court reasoned that:

[f]rom the outset, Gap personnel apparently understood that Glaser is impaired. While serving as Glaser’s trainer, and having observed that Glaser was ‘different’ and probably suffered from ‘a mental disability,’ [a Gap trainer testified that it was common knowledge] to ‘[m]ake sure nobody bothered him.’ When Glaser got upset, [a Gap trainer] was asked by supervisors to talk to him and ‘calm him down.’ [The trainer] mentioned to at least three Gap supervisors that Glaser would fixate on and not be able to solve a problem, and he spoke with at least one Gap manager about Glaser’s tendency to follow people around and get too close.<sup>93</sup>

Based on this evidence and other testimony, the district court held:

Under the ADA, an employer need not know the exact diagnosis to be liable for discrimination on the basis of a disability; liability may be premised on the employer’s perception, regardless of whether it is accurate, if the employer relies on such perception to engage in a prohibited act.<sup>94</sup>

### *C. Conclusion: Takeaways from Taylor and Glaser*

Both *Glaser* and *Taylor* show that simply by being Autistic in a neuromajoritarian environment, Autistic employees revealed themselves to be “societally other” by failing to conform to social rules and modes of being. Because of this, in both cases, rather than trying to establish a qualifying disability, the courts either found that the Autistic behaviors made the employer aware of the disability<sup>95</sup> or the employer did not challenge the Autism as a qualifying disability.<sup>96</sup> Either way, because the employee was regarded as Autistic, juries were permitted to hear the more important question for Autistic plaintiffs: Were the employees qualified to perform the job?

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91. *Id.* at 576.

92. *Id.*

93. *Id.* at 577 (citations omitted).

94. *Id.* at 578.

95. *Id.*

96. *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422 (11th Cir. 1998).



Now, consider this in terms of the classroom for an Autistic professor. Every day the professor has an audience who will witness his hand gestures, his failure to make eye contact, his awkward humor, and his questioning of student motives when he cannot read facial expressions. Perhaps he will inappropriately laugh and smile at times when others are stressed and upset. All of these behaviors and actions are not choices, but manifestations of neurology. Professor Melanie Yergeau beautifully describes the interplay between intention and invention in terms of Autistic behavior:

Embodied communicative forms—including the echo, the tic, the stim, the rocking body, the twirl—represent linguistic and cultural motions that pose possibility for autistics . . . Importantly, while invention has often been framed in relation to meaning or the beginnings of some grander future meaning, invention is also about scraps—items we’ve discarded, the embodied reeling that accompanies failure, the unintentional effects and affective responses.<sup>97</sup>

Yergeau’s description shows that the Autistic body and mind’s otherness, their deviations from the norm, are the unintentional effects of a body and mind that work in different ways than our neurotypical colleagues or students. I implore practitioners to pursue equal treatment for Autistics in higher education by articulating that our various records of differences at work create an Autistic composite and that any actions taken by our employers based on our neurology which the employer contends are “personality traits” prove that the employer regarded us as Autistic because our actions, reactions, and personalities are the branches that extend from the tree that is our core – Autism.

## V. WE’RE HERE, WE’RE NEUROQUEER,<sup>98</sup> GET USED TO IT!

The claim of disability rights makes a distinction between the individual model of disability, which locates the problems and

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97. MELANIE YERGEAU, *AUTHORING AUTISM: ON RHETORIC AND NEUROLOGICAL QUEERNESS* 181-82 (Duke University Press 2018).

98. Discussing the concept of neuroqueerness, Prof. Melanie Yergeau, a self-described neuroqueer and Autistic, writes:

The autistic subject, queer in motion and action and being, has been clinically crafted as a subject in need of disciplining and normalization. What autism provides is a back-door pathologization of queerness, one in which clinicians and lay publics alike seek out deviant behaviors and affectations and attempt to straighten them, to recover whatever neurotypical residuals might lie within the brain, to surface the logics and rhetorics of normalcy by means of early intensive behavioral intervention.

*Id.* at 26.

challenges of a disabled person in their physical or cognitive dysfunctions, and the social model of disability, which argues that disability is primarily a social condition caused or highlighted by the structure of society, the physical and social barriers, and the lack of appropriate environmental and community organization to support the social inclusion of disabled people . . . .<sup>99</sup>

Assuming an Autistic professor can successfully establish a “regarded as” claim, the question becomes whether an Autistic professor who is odd/different can be fired for being disabled? The decisions and supporting facts in both *Glaser* and *Taylor* exemplify that societal forces of neuromajoritarianism judge patterns and groupings of behaviors and reactions as insubordinate and aberrant.<sup>100</sup> These particular behaviors, in *Glaser*—social inappropriateness regarding personal space and repeated hand/arm movements during a meltdown,<sup>101</sup> and in *Taylor*—speaking loudly and asking questions that bothered some customers, arguably put employers on notice of the employee’s neurodivergence.<sup>102</sup> The questions I ask are: Do we as a society want to punish and fire Autistics whose social and behavioral differences violate, at most, cultural norms? Should the occasional discomfort of the neuromajority influence whether an otherwise capable Autistic should be employed? I contend that any considered adverse employment action against a self-disclosed or regarded-as Autistic professor at the university/college level should be evaluated very carefully by school administration, and the EEOC’s commentary and guidelines support this argument.

I am not asking for unequal treatment for Autistics. In fact, is important to note that employers are legally permitted to discipline employees with qualifying disabilities when the employee’s behavior violates “a conduct standard.”<sup>103</sup> As long as the “employee’s disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees.”<sup>104</sup> The EEOC guidelines provide an example where a blind employee takes extra breaks to smoke cigarettes and also

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99. Ripamonti, *supra* note 3, at 60.

100. See *Taylor*, 133 F.3d at 419; *Glaser*, 994 F. Supp. 2d at 569.

101. *Glaser*, 994 F. Supp. 2d at 571.

102. *Taylor*, 133 F.3d at 1423-24.

103. *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities*, EQUAL EMP. OPPORTUNITY COMMISSION (EEOC), <https://www.eeoc.gov/facts/performance-conduct.html#basic>.

104. *Id.*

taunts her supervisor, violating standards of conduct at the workplace that “are unrelated to her disability and the employer may discipline her for insubordination.”<sup>105</sup> The guidelines also permit employers to take disciplinary action against disabled employees if the conduct which created the workplace violation was caused by the employee’s disability.<sup>106</sup> However, the conduct rule must be “consistent with business necessity” and the employee with a disability must be held to the same standard as other employees.<sup>107</sup> The guidelines provide that employers have wide latitude to develop conduct rules involving profanity, yelling, pornography, lewd gestures, etc.<sup>108</sup> One of the crucial factors in examining whether the rule is “job-related and consistent with business necessity” includes “the working environment.”<sup>109</sup>

The EEOC guidelines also provide an example of a bank teller with Tourette Syndrome, a neurological condition like Autism, which can create involuntary and repeated verbal and physical tics.<sup>110</sup> The question raised in the example is whether a bank teller who curses and occasionally shouts at work, behaviors extending from her Tourette Syndrome, can be fired for violating conduct rules about cursing and disruption.<sup>111</sup> The EEOC provides that “termination is permissible because it is job-related and consistent with business necessity” because the behaviors interfere with serving customers in an appropriate manner.<sup>112</sup> As a disabled person, I experience great sadness by knowing that, legally, my body and my behaviors are judged by a society who does not understand me and who believes my natural modes and state of being are a choice. For those neurotypical readers, ask yourself how you would feel if your normal behaviors and tics were considered so unbecoming that you could be fired for simply being yourself—unrelated to the quality of your work.

If my behaviors and my disability are intertwined, how is terminating me for my behavior not an act of disability discrimination? While not reflective of the majority rule, which provides latitude to

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* However, I fundamentally disagree with the EEOC’s guidance on this issue involving Tourette Syndrome in the workplace and believe that it allows non-disabled persons to exclude people with disabilities from gainful employment and deny us a place in society. Such a discussion regarding customer service and neurological conditions will be the subject of another article.

employers to fire employees for behavior that violate customs or standards within the workplace *even if the behavior was directly related to a disability*,<sup>113</sup> the Ninth Circuit Court of Appeals provides a way forward that will allow disabled bodies to justifiably remain in employment when they breach employer rules because of their disabilities.<sup>114</sup>

*A. The Ninth Circuit's "Causal Link" Between Disability and Behavior*

In *Gambini v. Total Rental Care, Inc.*, a contracts clerk at a dialysis center was bipolar and told her co-workers she "was experiencing mood swings, which she was addressing with medications, and asked that they not be personally offended if she was irritable or short with them."<sup>115</sup> The clerk's supervisor called her into a meeting, without offering any explanation for the meeting, and failed to inform her that her former supervisor would be in attendance.<sup>116</sup> The supervisors informed the clerk that her "attitude and general disposition [were] no longer acceptable" in her department.<sup>117</sup> The clerk began to cry and read a performance plan.<sup>118</sup> Her bipolar associated symptoms escalated as she grew hot and experienced chest tightness.<sup>119</sup> The clerk threw the performance plan and "in a flourish of several profanities expressed her opinion that it was both unfair and unwarranted."<sup>120</sup> Before the clerk slammed the door on her way out of the office, she "hurled several choice profanities" at her supervisor and then threw things at and kicked her cubicle.<sup>121</sup> The clerk was ultimately terminated for her behavior during the meeting.<sup>122</sup>

At trial, the court failed to read a jury instruction that explained, "conduct resulting from a disability is part of the disability and not a separate basis for termination."<sup>123</sup> The Ninth Circuit Court of Appeals determined that "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was

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113. Hensel, *supra* note 12, at 80.

114. *Gambini v. Total Rental Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

115. *Id.* at 1091.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1091-92.

122. *Id.* at 1092.

123. *Id.* at 1093.

terminated on the impermissible basis of her disability.”<sup>124</sup> Ultimately, the court found that “if the law fails to protect the manifestations of her disability, there is no real protection in the law because it would protect the disabled in name only.”<sup>125</sup>

Because the Ninth Circuit fully grasps that one’s disability is inseparable from one’s conduct where the conduct is a direct biproduct of the disability, the Ninth Circuit’s conceptualization of disability law is the only just outcome which will allow Autistics to be part of the academy, rather than a misunderstood group of eccentrics who violate social norms, like the Tourette Syndrome example from the EEOC, who remain hidden from the larger working community.

### *B. The Eccentric Academic And The Academic Job-Related Function/Business Necessity of Inclusion*

The circumstances in *Glaser* and *Taylor* simply present “dilemmas” the neurotypical world faces when confronted with Autistics existing while working.<sup>126</sup> Consider this hypothetical: Assume an Autistic professor without tenure protections carries himself in such a manner that a student questions the professor’s “professionalism.” In part, the unorthodox, Autistic professor uses a comorbid Autistic form of expression, echolalia. Echolalia, which is “the immediate or delayed repetition of the speech of another, is associated with autism . . . is usually described as a non-functional self-stimulatory or stereotypical behavior . . . and is considered to be a positive intervention” for Autistics.<sup>127</sup> Perhaps the professor became fascinated with the title of Sheryl Sandberg’s *Lean In*,<sup>128</sup> and employed the phrase in multiple contexts several times per class session to encourage students to try and “lean in to that idea,” or in response to a question about wordcount the professor responds, “You can meet the 1,200 word count. Lean in!”<sup>129</sup> Over the course of the semester, this may begin to annoy students who do not neurologically crave repetition of sounds like an Autistic person does. Additionally, perhaps the professor curses in bursts from time-to-time,

124. *Id.*

125. *Id.* at 1095.

126. *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1421 (11th Cir. 1998); *Glaser v. Gap Inc.*, 994 F. Supp. 2d 569 (S.D.N.Y. 2014).

127. Jacqueline M.A. Roberts, *Echolalia and Language Development in Children with Autism*, in *TRENDS IN LANGUAGE ACQUISITION RESEARCH II: COMMUNICATION IN AUTISM* 55 (Joanne Arciuli & Jon Brock eds., John Benjamins Publishing Co. 2014).

128. Sheryl Sandberg, *LEAN IN—WOMEN, WORK, AND THE WILL TO LEAD* (Alfred A. Knopf New York 2013).

129. *Id.*

stringing expletives<sup>130</sup> together to describe social injustices or when explaining the importance of reading an assignment closely. On the Autistic professor's student evaluations, some students remark that the professor's use of expletives was offensive, and others remark that the professor was "intense."

Even if a university or college has rules against cursing, for example, if the Autistic professor can show that cursing is directly related to his Autism—an echolalial stimulatory behavior and alternative use of sound and language to which neurotypical society does not understand, the professor should be protected under the ADA. Litigators and appellate attorneys should work together until courts adopt the Ninth Circuit's approach to disability and behavior.<sup>131</sup> But for the sake of argument, assume that the law does not change as quickly as Autistic academics will need it to in order to protect them. Are Autistic academics in Pennsylvania strangers to the ADA—a law designed for people just like them?

I propose that colleges and universities should be able to create codes of conduct, but those codes should be narrowly tailored as to not include conduct that is irrelevant to the job-function. Ideas offend students in every classroom. Certain types of behaviors, such as sexist, racist, nationalist, homophobic, and ableist behaviors, should be fireable offenses whether the professor is neurotypical or Autistic. However, a fundamental difference exists between being off-putting, intense, unique, and quirky, versus perpetuating harmful stereotypes and judgments. One is a disability; the other is a societal cancer. One must be embraced (disability); the other must be drowned out by goodness and critical thinking in the marketplace of ideas.

Unlike certain cases discussed *supra*, a professor's job-function, dissimilar to someone in customer service, is to help diversify the classroom by presenting multiple perspectives and ability models to enrich the educational experience. An Autistic professor will already be sensory overloaded, and the idea that he will be able to regulate all the various components of his existence, which neurotypicals take for granted, is such an impossibility that Autistic professors like myself will always either come up short or be so focussed on neuromajoritarian concepts of conduct and professionalism that not only will we suffer, but our students will suffer because they will receive a competent product that was linguistically, socially,

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130. Echolalia is interrelated with cursing. Emma Nicholson, *I Taught My Son with Autism How to Swear*, HUFFINGTON POST (Jan. 9, 2014, 11:24 AM), [https://www.huffingtonpost.com/emma-nicholson/i-taught-my-son-with-autism-how-to-swear\\_b\\_4464885.html](https://www.huffingtonpost.com/emma-nicholson/i-taught-my-son-with-autism-how-to-swear_b_4464885.html).

131. See generally *Gambini v. Total Rental Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

and behaviorally stunted for the sake of congeniality. This is especially true for Autistic law professors who do not lecture but actively engage in the back-and-forth of classroom discussion in the Socratic method.

While I want to live in a world that accepts the Ninth Circuit's approach to disability,<sup>132</sup> I also know that such a departure from social norms will likely feel burdensome to the judiciary and employers. Practitioners should seek test cases from academia, arguably a group with more employment freedom than any other, to challenge existing approaches to our current legal system. Although I desire systemic change, and I hope that disability activists across the country will take the arguments in this Article and begin to construct a neurodiverse and neuroinclusive future, I want to note that colleges and universities can pave the way without any litigation. If human resources departments and university/college administrators begin looking at Autistics as whole persons who process the world so differently that their entire mode of being will be different than their peers and students, schools can stop any problems with social norms before they begin by discussing a professor's diagnosis with them after they have witnessed and heard report of enough Autistic behaviors to regard the employee as Autistic. The EEOC permits this if the employer believes the disabled person's behaviors and conduct, based on objective evidence, are related to a disability that inhibits the employee from performing an essential function.<sup>133</sup>

## VI. CONCLUSION

Ultimately, I envision a future where Autistic professors and other neurodivergent academics assist in changing the scope and application of disability law so that Autistics, and all of our differences and quirks, are integrated into the workplace so we do not worry that just being ourselves will lead to joblessness. Few studies regarding Autistics and employment exist, but anecdotally and personally, Autistic people have explained that the social awkwardness and quirkiness associated with Autism have stopped them from being hired. For example, Leigh, a 39-year-old Autistic, holds a master's degree in library science, relevant work experience, and a 145 IQ. After Leigh was laid off, he tried to find work, but the combination of unfiltered candor and the interview process of a neurotypical world denied him entry to employment:

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132. See generally *id.*

133. *The Americans With Disabilities Act*, *supra* note 103.

[I]n interviews, he invariably presents as quirky, which can be off-putting for those less familiar with 'folks on the spectrum.' When asked last year during one library interview how well he would do managing a small team of volunteers, Leigh replied, 'Not very well. I can be tyrannical.' He did not get the job.

'I'm at a precipice,' Leigh says. 'I'm so high-functioning that I don't really register as disabled, but I'm not high-functioning enough that I can easily utilize anything social.'<sup>134</sup>

I argue that Leigh's Autism, no matter how high functioning he presents, inhibited his ability to work. Most employers, I believe, suspect that an employee who uses unfettered candor in an interview must either be rich or disabled, as those are two of the only logical reasons for disclosing "tyrant tendencies."<sup>135</sup>

Autistic academics, and Autistics across the spectrum, deserve the right to full personhood, and in a society where employment, capital, and medical care determine outcomes for all people, but especially disabled persons, our right to full personhood is connected to our ability to survive financially. Is it so bad if a professor wanders around the classroom while talking and utters curse words when he discusses a hot-topic that exemplifies the injustices in society? Is telling a coworker that one needs more personal space or helping to set ground rules really so debilitating for non-disabled persons that they would rather fire us than work with us?

While I am lucky to have an employer in the Duquesne University School of Law who knows and celebrates me, my teaching, and my Autism, most Autistics are not as lucky. The arguments presented herein are for them, based on my research and experiences as an Autistic living in a neurotypical world. My hope is that the day will come when we no longer have to explain ourselves away and will be protected against the way the neuromajority views us, even when we never thought to inform our workplaces of our Autism, as all we intended to do was be ourselves.

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134. Carr, *supra* note 2.

135. If you find yourself giggling at this definition I've just proven that Autistics have a sense of humor. Still, I stand by the statement.



# Rethinking Business Privilege Taxes in the Internet Age

Patricia L. Shoenberger\*

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## I. INTRODUCTION

“By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the dormant Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce.”<sup>1</sup> The Supreme Court of Ohio emphasized this quote, both in its majority opinion and in Justice Kennedy’s dissenting opinion, in the case of *Crutchfield Corp. v. Testa*.<sup>2</sup> This 2016 case involved a constitutional challenge to Ohio’s commercial-activity tax (“CAT”) by Crutchfield Corporation (“Crutchfield”), a company that had no connection to Ohio other than the shipment of goods to customers located in Ohio by way of the United States Postal Service or other common carrier.<sup>3</sup> The CAT is imposed on each person or business receiving gross-receipts of \$500,000 or more from goods that were “ultimately received [in Ohio] after all transportation [was] completed.”<sup>4</sup> Crutchfield argued that the tax was unconstitutionally applied due to a lack of substantial nexus with the state of Ohio because it had no physical presence there; however, the Supreme Court of Ohio disagreed, finding that physical presence, while sufficient, is not necessary to impose a business privilege tax.<sup>5</sup> The Court held that there only needs to be “an adequate quantitative standard,” and the \$500,000 minimum threshold constituted such a standard.<sup>6</sup>

The majority opinion distinguished seemingly applicable case law in two ways. First, it excluded, as distinguishable, any case law decided prior to *Complete Auto Transit, Inc. v. Brady* (“*Complete Auto*”).<sup>7</sup> The *Crutchfield* court noted that the *Complete Auto* decision lifted the ban on all taxation for the privilege of engaging in interstate commerce imposed by *Spector Motor Service, Inc. v. O’Connor*.<sup>8</sup> Instead, *Complete Auto* imposed a four-part test under which state taxation of interstate commerce is analyzed today.<sup>9</sup> Second, the court contrasted business privilege taxes, which tax

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1. *Crutchfield Corp. v. Testa*, 88 N.E.3d 900, 914, 916 (Ohio 2016) (alteration in original) (emphasis omitted) (quoting *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015)).

2. *Id.*; see also *id.* at 916 (Kennedy, J., dissenting).

3. *Id.* at 902.

4. *Id.* at 902-03.

5. *Id.* at 904, 910.

6. *Id.* at 910.

7. *Id.* at 908; see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977).

8. *Crutchfield*, 88 N.E.3d at 907; see also *Complete Auto*, 430 U.S. at 289; *Spector Motor Serv. v. O’Connor*, 340 U.S. 602, 609 (1951) (holding that states cannot tax “the privilege of doing interstate business”), overruled by *Complete Auto*, 430 U.S. at 28.

9. *Complete Auto*, 430 U.S. at 279.

business gross-receipts, with sales and use taxes, which tax individual purchases.<sup>10</sup> It reasoned that, because the individuals being taxed were different, the cases concerning sales and use taxes, such as *Quill Corp. v. North Dakota*, were not applicable law for the case at hand.<sup>11</sup> Justice Kennedy, in his dissenting opinion, stated, “The majority relies on the absence of United States Supreme Court decisions directly on point and treats this case as though it exists in a vacuum. It does not.”<sup>12</sup>

*Crutchfield* raises an interesting dilemma for current e-commerce sellers: Should states be permitted to impose business privilege taxes on Internet-based companies, whose sole connection to the state is customers’ receipt of goods through the mail?<sup>13</sup> The answer is that the current scheme of state business privilege taxes present unconstitutional burdens on interstate commerce, and Congress should enact legislation which sets an economic percentage maximum and clarifies the many questions these tax schemes raise. The analysis begins with the foundation of the dormant Commerce Clause implied in the Constitution, and an overview of the major applicable and comparable case law beginning with *Complete Auto* and shifting to the interpretation of the four prongs of the *Complete Auto* test. Next, an analysis of what e-commerce is and its current state provides necessary information for the application of the *Complete Auto* test to business privilege taxes on Internet-based retailers. Finally, a look at the negative legal and economic impacts of these taxes on Internet-based interstate commerce leads to a conclusion that the current state business privilege tax scheme is unconstitutional and, as a result, Congress should enact legislation concerning Internet-based retailers.

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10. *Crutchfield*, 88 N.E.3d at 911.

11. *Id.* at 910-11; *see also* *Quill Corp. v. North Dakota*, 504 U.S. 298, 302-03 (1992), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

12. *Crutchfield*, 88 N.E.3d at 916 (Kennedy, J., dissenting).

13. *Id.* at 904; *see also* *Diversified Ingredients, Inc. v. Testa*, No. 4:15-CV-1935RLW, 2016 WL 2932160, at \*1, \*3 (E.D. Mo. 2016) (holding the federal district court lacked jurisdiction to hear a dispute regarding Ohio’s Commercial Activity Tax and *Diversified Ingredients, Inc.*, an online company with no connection to Ohio other than the shipment of commodity pet food ingredients to customers located in Ohio); *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, 987 N.E.2d 621, 626 (N.Y. 2013) (holding New York’s Internet Tax constitutional as applied to *Overstock.com, Inc.* and *Amazon.com, LLC* because the companies contracted with local website owners to solicit sales via advertisements. “The bottom line is that if a vendor is paying New York residents to actively solicit business in this state, there is no reason why that vendor should not shoulder the appropriate tax burden.”).

II. FROM THE COMMERCE CLAUSE, FOUND IN THE CONSTITUTION, THE SUPREME COURT HAS INFERRED THE EXISTENCE OF THE DORMANT COMMERCE CLAUSE, WHICH CONTROLS WHEN A STATE MAY TAX INTERSTATE COMMERCE.

A. *The Origins of the Dormant Commerce Clause*

One of Congress's most important enumerated powers is the Commerce power, because it allows Congress to legislate a broad array of topics.<sup>14</sup> The Constitution states, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>15</sup> From this provision, the Supreme Court has inferred the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce.<sup>16</sup> "If Congress has legislated, the question is whether the federal law preempts the state or local law . . ."<sup>17</sup> If Congress has not passed legislation either in support of or invalidating state and local laws, those laws can be challenged as "unduly impeding interstate commerce."<sup>18</sup> The latter is referred to as the dormant Commerce Clause.<sup>19</sup>

Congress, however, has neither passed nor invalidated business privilege taxes imposed on Internet-based companies whose only contact with the state is the shipment of goods to customers therein; therefore, any state business privilege tax, including the Ohio CAT, falls under the dormant Commerce Clause.<sup>20</sup> As demonstrated by the discussion below, the Supreme Court has, throughout recent history, recognized the difficulty of applying the dormant Commerce Clause to interstate commerce considering changing business environments and a technologically advancing society.

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14. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 250 (Richard A. Epstein et al. eds., 5th ed. 2015).

15. U.S. CONST. art. I, § 8, cl. 3.

16. CHERMERINSKY, *supra* note 14, at 444.

17. *Id.*

18. *Id.*

19. *Id.*

20. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018); *c.f.* S. Res. 433, 115th Cong., 2d Sess. (2018) (deciding that the Marketplace Fairness Act, which proposes a uniform sales tax on Internet purchases, would be unduly burdensome to small businesses and harmful to the economy).

### B. *The Establishment of the Complete Auto Test*

From the conception of the dormant Commerce Clause until 1977, the Supreme Court enforced the rule that no state was permitted to directly tax interstate commerce.<sup>21</sup> In 1977, however, *Complete Auto* was decided, and the Court refused to adopt a *per se* rule to govern state taxation of interstate commerce; instead, the Court established a four-part test.<sup>22</sup> *Complete Auto Transit, Inc.*, a Michigan corporation, transported vehicles for General Motors Corporation (“General Motors”).<sup>23</sup> General Motors would assemble cars outside of Mississippi, ship them into Mississippi via railway, and *Complete Auto Transit, Inc.* would then load the cars onto its trucks for transport to the Mississippi dealers.<sup>24</sup> Mississippi imposed a business privilege tax on *Complete Auto Transit, Inc.* for its activity in the state.<sup>25</sup> The Supreme Court of Mississippi sustained the tax, reasoning that *Complete Auto Transit, Inc.* was “dependent upon the State for police protection.”<sup>26</sup>

The Supreme Court of the United States affirmed the decision and found the law constitutional.<sup>27</sup> It reasoned that *Complete Auto Transit, Inc.* argued only that the tax was unconstitutional because it “was imposed on nothing other than the ‘privilege of doing business’ that is interstate.”<sup>28</sup> The argument was based on the Spector Rule, which said taxes on the privilege of doing business could not be applied to activities that are part of interstate commerce, but the Court decided to overrule the Spector Rule.<sup>29</sup> Instead, it held that a tax would be sustained “against [the] Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.”<sup>30</sup> The Court, however, did not apply

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21. CHEMERINSKY, *supra* note 14, at 479; *see also, e.g.*, *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 609 (1951), *overruled by* *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (holding that states cannot tax “the privilege of doing interstate business”); *Freeman v. Hewit*, 329 U.S. 249, 256-57 (1946) (invalidating an Indiana gross receipts tax because imposing the tax interfered with the freedom of interstate commerce); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 329 (1944) (invalidating an Arkansas sales tax because it taxed interstate goods).

22. CHEMERINSKY, *supra* note 14, at 479.

23. *Complete Auto*, 430 U.S. at 276.

24. *Id.*

25. *Id.* at 276-77.

26. *Id.* at 277.

27. *Id.* at 289.

28. *Id.*

29. *Id.* at 277-78, 288-89.

30. *Id.* at 279.

the new test to these facts because Complete Auto Transit, Inc. did not argue any of the elements.<sup>31</sup> The elements of the *Complete Auto* test became the new focus of state taxation challenges. What follows is a step-by-step analysis of those four elements.

### 1. *The Substantial Nexus*

States can only tax interstate commerce when there is a “substantial nexus” between the individual being taxed and the state imposing the tax.<sup>32</sup> Prior to the “substantial nexus” inquiry established in *Complete Auto*, the Court used the physical presence test, which was first established ten years prior to *Complete Auto* in a case involving an Illinois use tax.<sup>33</sup> In 1967, the Department of Revenue (“Department”) in Illinois sued National Bellas Hess (“National”), a mail-order corporation incorporated in Delaware with its principal place of business in Missouri.<sup>34</sup> The case concerned an Illinois tax placed on customers who purchased goods from an out-of-state company for use within the state of Illinois.<sup>35</sup> The Department sued National, claiming the company had to collect the use tax from its customers and pay the Department.<sup>36</sup> The Illinois Supreme Court required National to pay the tax even though National had no contacts with the state of Illinois other than twice-a-year catalogs, occasional “flyers,” and merchandise orders delivered to its customers by mail or common carrier.<sup>37</sup> On appeal to the Supreme Court of the United States, National argued the tax violated the Due Process Clause and was an “unconstitutional burden upon interstate commerce.”<sup>38</sup>

The Court said the analyses for Due Process and the dormant Commerce Clause were similar because the main question in both was whether the individual was “accorded the protection and services of the taxing State.”<sup>39</sup> It held the tax unconstitutional as an undue burden on interstate commerce, reasoning there is a “sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than

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31. *Id.* at 289.

32. *Id.* at 279.

33. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 755 (1967), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

34. *Id.* at 753-54.

35. *Id.* at 754.

36. *Id.*

37. *Id.* at 754-55.

38. *Id.* at 756.

39. *Id.* at 757.

communicate with customers in the State by mail or common carrier.”<sup>40</sup>

Following *National Bellas Hess*, the Court clarified in *Quill Corp. v. North Dakota* that, while an individual may have the significant contacts necessary for Due Process, that does not automatically make those contacts sufficient to establish a substantial nexus under the *Complete Auto* test.<sup>41</sup> Quill, a Delaware corporation, had offices and warehouses in Illinois, California, and Georgia, but sold office equipment and supplies to customers and businesses nationwide.<sup>42</sup> Quill solicited sales through “catalogs and flyers, advertisements in national periodicals, and telephone calls.”<sup>43</sup> North Dakota imposed a use tax on “retailers,” defined as “every person who engages in regular or systematic solicitation of a consumer market in the state,” including mail-order companies without property or employees in North Dakota.<sup>44</sup> The State sued to compel Quill to pay the tax.<sup>45</sup>

At trial, the court found for Quill, holding “the case indistinguishable from [*National*] *Bellas Hess*.”<sup>46</sup> Further, it found that the State failed to show a nexus allowing it to define “retailer” as it did.<sup>47</sup> The Court reasoned that “the State had not shown that it had spent tax revenues for the benefit of the mail-order business.”<sup>48</sup> The North Dakota Supreme Court reversed.<sup>49</sup> It reasoned that the increase in mail-order business and the recent decisions involving the Commerce Clause made *National Bellas Hess* an inappropriate test in the current economic and legal setting.<sup>50</sup>

The Supreme Court of the United States reversed, holding the tax unconstitutional.<sup>51</sup> It established there is a difference in the analyses of the Due Process Clause and the dormant Commerce Clause because the two have different legislative intents.<sup>52</sup> The “relevant inquiry under [*Complete Auto*] was whether ‘the state has provided some protection, opportunities, or benefit for which it can

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40. *Id.* at 758.

41. *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

42. *Id.* at 302.

43. *Id.*

44. *Id.* at 302-03 (quoting N.D. CENT. CODE § 57-40.2-01(6) (1991)).

45. *Id.* at 303.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 319.

52. *Id.* at 305.

expect a return.”<sup>53</sup> In addition, the Court further clarified, while its decisions after *Complete Auto* demonstrate a move toward more flexible balancing rules, the bright-line physical presence test had not been overruled.<sup>54</sup> It reasoned that a bright-line test, while not appropriate for every situation, furthers the ends of the dormant Commerce Clause by “firmly establish[ing] the boundaries of legitimate state authority,” “encourag[ing] settled expectations,” and “foster[ing] investment by business and individuals.”<sup>55</sup>

In 2018, the Supreme Court of the United States overruled the physical presence requirement established in *Quill* and *National Bellas Hess*.<sup>56</sup> South Dakota enacted a law requiring out-of-state sellers to collect and remit sales tax if, “on an annual basis, [they] deliver more than \$100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State.”<sup>57</sup> Wayfair, Inc.; Overstock.com, Inc.; and Newegg, Inc. are all merchants that easily meet the thresholds imposed by South Dakota’s law, but the companies have no employees or real estate in South Dakota.<sup>58</sup> South Dakota filed a declaratory action seeking an injunction requiring these merchants to register for licenses to collect and remit sales tax.<sup>59</sup> “Respondents moved for summary judgment, arguing that the Act is unconstitutional.”<sup>60</sup> South Dakota conceded that under *National Bellas Hess* and *Quill* the Act is unconstitutional; however, the state urged the Court to review those decisions.<sup>61</sup> The trial court granted the motion for summary judgment and the South Dakota Supreme Court affirmed.<sup>62</sup>

The Supreme Court of the United States overruled the physical presence requirement established in *National Bellas Hess* and *Quill*.<sup>63</sup> The Court reasoned that the physical presence requirement is arbitrary and artificial, and in the changing economic landscape, it ignores “substantial virtual connections to the State.”<sup>64</sup>

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53. *Id.* at 304 (quoting *State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 216 (N.D. 1991)).

54. *Id.* at 314.

55. *Id.* at 315-16.

56. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

57. *Id.* at 2089.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 2099.

64. *Id.* at 2092, 2095.



Further, the Court stated, “The physical presence rule [*Quill*] defines has limited States’ ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.”<sup>65</sup> Finally, the Court reasoned that “other aspects of the Court’s Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines.”<sup>66</sup>

The Supreme Court, in a case involving Tyler Pipe Industries, Inc. (“Tyler Pipe”), demonstrated that while physical presence can be a flexible standard, there still must be some type of intentional availment of the state’s consumer market.<sup>67</sup> Tyler Pipe challenged the state of Washington for a refund of a business privilege tax, arguing the company lacked a sufficient nexus for the tax to be constitutionally imposed.<sup>68</sup> Tyler Pipe sold pipes, fittings, and drainage products in the state of Washington.<sup>69</sup> It had no offices, property, or employees located within the state of Washington; however, it did contract with an independent contractor out of Seattle to take care of its daily sales business with customers.<sup>70</sup> Both the trial court and the state supreme court held that these sales representatives established a nexus with the state.<sup>71</sup> The state supreme court specifically held that the classification of “independent contractor” instead of “agent” was irrelevant.<sup>72</sup> It held that the representative acted daily on behalf of the company, calling on customers and soliciting orders with whom Tyler Pipe has long-standing relationships, and that this action helped to increase market share for Tyler Pipe in Washington.<sup>73</sup> The Supreme Court of the United States agreed with this reasoning, and held there was a substantial nexus.<sup>74</sup>

The majority opinion in *Crutchfield* held that *Tyler Pipe* stands for the concept that physical presence is a sufficient standard for substantial nexus, but not a necessary standard.<sup>75</sup> While this is an accurate analysis of the holding, the *Crutchfield* majority failed to recognize that the Court in *Tyler Pipe* certainly implied that, in the

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65. *Id.* at 2096.

66. *Id.* at 2098.

67. *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 249 (1987).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 250.

73. *Id.* at 249.

74. *Id.* at 250-51.

75. *Crutchfield Corp. v. Testa*, 88 N.E.3d 900, 912 (Ohio 2016).

very least, the company must target that state to establish a nexus.<sup>76</sup> The Court quoted the reasoning of the state supreme court, stating:

As the Washington Supreme Court determined, “the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales.” The court found this standard was satisfied because Tyler’s “sales representatives perform any local activities necessary for maintenance of Tyler Pipe’s market and protection of its interests . . . .”<sup>77</sup>

The key phrases in this quote are “activities . . . significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales” and “local activities necessary for maintenance.”<sup>78</sup> The likely premise behind nexus is that the company is targeting that state in order to establish customer relationships.

The substantial nexus portion of the *Complete Auto* test concerns the nexus between the state and the seller and does not consider the activity sought to be taxed.<sup>79</sup> In *National Geographic Society v. California Board of Equalization*, National Geographic Society appealed a decision by the California Supreme Court requiring it to pay a business privilege tax.<sup>80</sup> National Geographic Society was a District of Columbia (“D.C.”) nonprofit corporation focused on science and education.<sup>81</sup> The corporation had two offices in California whose purpose was to solicit advertising for the monthly magazine.<sup>82</sup> The D.C. offices ran a mail-order business selling maps, atlases, globes, and books.<sup>83</sup> The California office activities had no connection to the sales from the D.C. offices.<sup>84</sup> The California Supreme Court found the liability of tax violated neither Due Process

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76. *Tyler Pipe Indus.*, 483 U.S. at 250-51.

77. *Id.* (quoting *Tyler Pipe Indus. v. Dep’t of Revenue*, 715 P.2d 123, 125-26 (Wash. 1996)).

78. *Id.*

79. *Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551, 560 (1977).

80. *Id.* at 554.

81. *Id.* at 552.

82. *Id.*

83. *Id.*

84. *Id.*

nor the Fourteenth Amendment.<sup>85</sup> It concluded “the ‘slightest presence’ of the seller in California established sufficient nexus between the State and the seller.”<sup>86</sup>

The Supreme Court of the United States affirmed the decision; however, it did not agree with the “slightest presence” standard.<sup>87</sup> It reasoned that the “maintenance of two offices” and “solicitation by employees” were much more than the “slightest presence.”<sup>88</sup> The Court disagreed with the National Geographic Society’s argument that “there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller’s activity within the State.”<sup>89</sup> This implies that in cases involving business privilege taxes, the gross-receipts being taxed must stem from some type of in-state activity.

Based on the above cases and their application of the *Complete Auto* test, there are four key takeaways regarding the substantial nexus requirement. First, the *National Bellas Hess* physical presence test, which was reaffirmed in *Quill Corp.*, has been overruled, and is no longer applicable law.<sup>90</sup> Second, *Quill Corp.* established that the *Complete Auto* test requires more than just the “minimum contacts” standard for Due Process, and that the test is focused on what the taxpayer owes the state for usage of its resources.<sup>91</sup> Third, *Tyler Pipe* demonstrated that, while physical presence can be a flexible standard, there still must be some type of intentional availment of the state’s consumer market.<sup>92</sup> Fourth, *National Geographic Society* reinforced that the “slightest presence” was not a sufficient nexus, and implied that there must be some in-state activity that results in gross-receipts in order for those gross-receipts to be taxed.<sup>93</sup>

## 2. Fair Apportionment

Fair apportionment refers to the concept that the tax should only be focused on the business activities completed within the state imposing the tax, and that a state cannot tax activities in another

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85. *Id.* at 554.

86. *Id.* at 555.

87. *Id.* at 556.

88. *Id.*

89. *Id.* at 560.

90. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

91. *Quill Corp. v. North Dakota*, 504 U.S. 298, 304 (1992), *overruled by Wayfair*, 138 S. Ct. 2080.

92. *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 250 (1987).

93. *Nat’l Geographic*, 430 U.S. at 555, 560.

state.<sup>94</sup> The policy behind fair apportionment is to avoid multiple taxation of gross-receipts.<sup>95</sup> Further, a tax is fairly apportioned when it is both internally and externally consistent.<sup>96</sup>

Internal consistency concerns the structure of the tax.<sup>97</sup> In order to determine whether a tax is internally consistent, one must ask "whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."<sup>98</sup> The policy behind internal consistency is to ensure states are only taxing their fair share of interstate commerce; therefore, if an activity might be subject to multiple taxation, it goes against policy.<sup>99</sup> For example, *Central Greyhound Lines, Inc. v. Mealy* involved an internal consistency issue.<sup>100</sup> Central Greyhound Lines, Inc. ("Central Greyhound") operated a bus that transported patrons from one point in New York to another point in New York; however, 43% of the route was through both Pennsylvania and New Jersey.<sup>101</sup> New York sought to impose a tax on the gross receipts from ticket sales of the bus line.<sup>102</sup> The Tax Commission of New York upheld the tax, and the state courts affirmed that decision.<sup>103</sup> Central Greyhound appealed, arguing that the tax was unconstitutional because the service was interstate commerce.<sup>104</sup>

The Supreme Court reversed and found the tax to be unconstitutional as written.<sup>105</sup> It was significant that neither Pennsylvania nor New Jersey were imposing taxes on the gross receipts from the mileage traveled within their state.<sup>106</sup> Although the taxes were not implemented at that point, the mileage could have reasonably been subject to taxation in those states as well.<sup>107</sup> Based on this reasoning, the Court found that permitting New York to tax the out-of-state portion of the travel was an undue burden on interstate commerce.<sup>108</sup> It did, however, hold that the tax could be apportioned in

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94. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995).

95. *Id.*

96. *Id.* at 185.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* 334 U.S. 653, 660 (1948).

101. *Id.* at 654, 660.

102. *Id.*

103. *Id.* at 655.

104. *Id.* at 654.

105. *Id.* at 664.

106. *Id.* at 662.

107. *Id.*

108. *Id.*

a way that would fall within the test, but that the restructuring of the apportionment was up to the state.<sup>109</sup>

External consistency is not concerned with the fact that an identical statute will be imposed in another state, but it is instead concerned with the possibility of two different statutes having identical effects.<sup>110</sup> For example, in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, the Court analyzed an external consistency problem involving a sales tax.<sup>111</sup> Jefferson Lines, Inc. (“Jefferson”) a Minnesota corporation, ran a bus line in Oklahoma.<sup>112</sup> Oklahoma imposed a sales tax on tickets for trips originating in Oklahoma.<sup>113</sup> Jefferson collected the sales tax on tickets for travel within the state, but not on tickets originating in Oklahoma and terminating in another state.<sup>114</sup> After Jefferson filed for bankruptcy, the Tax Commissioner filed to collect the unpaid taxes.<sup>115</sup>

Jefferson opposed the imposition of tax liability, arguing that the tax “present[ed] the danger of multiple taxation.”<sup>116</sup> The Bankruptcy Court, the District Court, and the Court of Appeals all agreed with Jefferson,<sup>117</sup> but the Supreme Court of the United States granted certiorari and reversed.<sup>118</sup> It held the tax was “externally consistent, as reaching only the activity taking place within the taxing State, that is, the sale of the service.”<sup>119</sup> The Court refused to extend the holding in *Central Greyhound* because, here, the business and the customer would each be taxed for the same activity, but neither party would be taxed twice.<sup>120</sup> It is important to note, however, that external consistency still only involves activities taking place within the state.<sup>121</sup> Business privilege taxes that tax activities outside of the state likely would not be externally consistent because there is a risk of multiple taxation of the same activity.

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109. *Id.* at 663.

110. *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

111. *Id.*

112. *Id.* at 178.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 179.

119. *Id.* at 196.

120. *Id.* at 190.

121. *Id.* at 196.

### 3. *Discrimination*

Under the *Complete Auto* test, state taxes may not discriminate against out-of-state businesses.<sup>122</sup> Taxes are discriminatory when they are levied on either “the privilege of doing interstate business within the state” or on “some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself.”<sup>123</sup> In one case addressing discrimination, *Memphis Natural Gas Company* (“*Memphis*”), a Delaware Corporation, was operating a pipeline through Arkansas, Louisiana, Mississippi, and Tennessee.<sup>124</sup> One hundred thirty-five miles of the pipeline ran through Mississippi.<sup>125</sup> Mississippi imposed a “franchise or excise tax” on any corporation “doing business” in the state.<sup>126</sup> *Memphis* petitioned the Tax Commission of Mississippi for review of the tax, arguing the tax was “prohibited by the Commerce Clause.”<sup>127</sup> The Tax Commission approved the tax and the Court of Appeals reversed.<sup>128</sup> The Supreme Court of Mississippi approved of the tax and reasoned that the state was not attempting to tax interstate commerce, but was being compensated for “its protection of lawful activities carried on in this State by the corporation, foreign or domestic.”<sup>129</sup>

The Supreme Court of the United States affirmed the decision.<sup>130</sup> It agreed with the state supreme court’s reasoning that Mississippi did not “attempt to tax the privilege of doing an interstate business” or to gain anything other than “compensation for the protection of the enumerated local activities of ‘maintaining, keeping in repair and otherwise in manning the facilities.’”<sup>131</sup> It also found that the activities were not essential enough to interstate commerce to warrant protection under the Commerce Clause.<sup>132</sup> The Court noted that taxing activities outside the boundaries of the state is beyond the power of the state, but the activities in this case were those that “the state, not the United States, gives protection.”<sup>133</sup> The policy here appears to limit a state’s authority to those activities conducted within its state boundaries because that state is the one

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122. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

123. *Memphis Nat. Gas Co. v. Stone*, 335 U.S. 80, 88-89 (1948).

124. *Id.* at 80-81.

125. *Id.* at 81.

126. *Id.*

127. *Id.* at 82.

128. *Id.*

129. *Id.*

130. *Id.* at 96.

131. *Id.* at 93 (quoting *Stone v. Memphis Nat. Gas Co.*, 29 So. 2d 268, 270 (Miss. 1947)).

132. *Id.* at 95.

133. *Id.* at 96.

funding any type of protection or support.<sup>134</sup> Once the state starts taxing activities beyond its boundaries, it is no longer providing support for those activities, and it is instead taxing interstate commerce itself.<sup>135</sup>

#### 4. *Fair Relation to State Services*

The policy behind non-discriminatory taxes takes shape in the requirement that the tax be fairly related to state services.<sup>136</sup> A tax requiring businesses to share in the state tax burden is only justified when it relates to the extent of the contact with that state.<sup>137</sup> For example, in *Commonwealth Edison Co. v. Montana*, four Montana coal producers and eleven of their out-of-state customers sought refunds from a Montana tax on the extraction of coal.<sup>138</sup> The trial court upheld the tax, and the Montana Supreme Court affirmed.<sup>139</sup> The Montana Supreme Court reasoned that the extraction of coal was an intrastate activity; therefore, it was not subject to the Commerce Clause.<sup>140</sup> The coal producers appealed to the Supreme Court of the United States, arguing that “the amount collected under the Montana tax is not fairly related to the additional costs the State incurs because of coal mining.”<sup>141</sup>

The Supreme Court held that the tax was fairly related to state services because Montana imposed it as a general revenue tax.<sup>142</sup> It said the test for fair relation is not a comparison between the amount taxed and the cost to the state associated with the activity; instead, “the test is closely connected to the first prong of the *Complete Auto* test.”<sup>143</sup> It reasoned, “the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a ‘just share of state tax burden.’”<sup>144</sup> Essentially, fair relation does not mean the state may only tax the exact fair market value of its protective or supportive services; however, it does have

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134. *See id.* at 93-96.

135. *Id.* at 95.

136. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620 (1981).

137. *Id.*

138. *Id.* at 613.

139. *Id.*

140. *Id.* at 613-14.

141. *Id.* at 620.

142. *Id.* at 621.

143. *Id.* at 625-26.

144. *Id.* (quoting *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

to ensure that the tax is “reasonably related to the extent of the contact.”<sup>145</sup>

### C. *The Internet Age and E-Commerce*

It is now possible for a business to have a large percentage of its revenue come from a state where it technically conducts no business and has no contacts other than communications with customers via the Internet. In terms of the Commerce Clause, the Internet is changing the way we look at state borders. The Internet itself has no borders, and, therefore, our concept of interstate commercial activity broadens.

With the dawn of the Internet-age, the already complicated interstate commerce question became more complicated due to electronic commerce (“e-commerce”). E-commerce is “all electronically mediated information exchanges between an organisation [sic] and its external stakeholders.”<sup>146</sup> E-commerce is a large portion of the retail market and is continuing to grow: “the estimate of U.S. retail e-commerce sales for the third quarter of 2018, adjusted for seasonal variation, but not for price changes, was \$130.9 billion, an increase of 3.1 percent ( $\pm 0.5\%$ ) from the second quarter of 2018.”<sup>147</sup> For purposes of this article, e-commerce will be focused on “[s]ell-side e-commerce,” or “transactions involved with selling products to an organisation’s [sic] customers.”<sup>148</sup> Sell-side e-commerce involves not only the order from the customer, but the marketing efforts leading up to those orders.<sup>149</sup>

E-commerce challenges the dormant Commerce Clause because it allows customers to order products directly from a website and have them delivered to their home. The business, in turn, can conduct its affairs by simply using United States mail services. For example, Amazon.com is a large-scale online retailer.<sup>150</sup> Customers visit the website and search for whatever product they are looking for, anything from electronics to groceries, and they add the product

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145. *Id.*

146. DAVE CHAFFEY, *DIGITAL BUSINESS AND E-COMMERCE MANAGEMENT* 13 (Pearson Educ. Ltd., 6th ed. 2015).

147. U.S. DEP’T OF COMMERCE, *Quarterly Retail E-Commerce Sales 3rd Quarter 2018*, U.S. CENSUS BUREAU (Nov. 19, 2018, 10:00 AM), [https://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf).

148. CHAFFEY, *supra* note 146, at 14.

149. *Id.* at 17.

150. AMAZON, <https://amazon.com> (last visited Feb. 5, 2018).



to their “cart.”<sup>151</sup> The consumer then goes to their “cart,” and proceeds to “check-out.”<sup>152</sup> They input their payment information and shipping information, and complete their purchase.<sup>153</sup> Once the purchase is complete, Amazon fulfills the orders and ships the products directly to the consumer. Customers can do the same on smaller scale websites. For example, Lulu’s is an online clothing retailer where customers can make a purchase online and have the products delivered directly to the consumer’s home without Lulu’s ever having to act in the state the customer is located.<sup>154</sup>

The evolution becomes even more strenuous when we see new business models forming. For example, Ipsy is a subscription-based company providing skin care and make-up products to customers.<sup>155</sup> Customers first create an account and fill out a survey regarding what their product preferences are.<sup>156</sup> The company then fills a bag full of sample products and ships the bag to the consumer.<sup>157</sup> The subscription costs around \$10 per month.<sup>158</sup> In these cases, the customer is not even the one choosing their products; they are just signing up to receive samples.<sup>159</sup>

Another example is a company like Etsy, which provides a platform for individuals who sell crafts.<sup>160</sup> On Etsy, a seller creates their own store.<sup>161</sup> All orders go to the seller, the seller fulfills the order, and the seller sends out the package.<sup>162</sup> The consumer, however, only ever interacts with the Etsy platform.<sup>163</sup> They order from Etsy.com, and Etsy communicates with the seller. Technically, under the business privilege tax model currently in place in Ohio, these individuals could be subject to business privilege taxes if they meet the minimum revenue requirement.<sup>164</sup> The issue becomes is the tax imposed on the individual seller, Etsy.com, or are both the seller and Etsy taxed for the same sale?

Mail-order companies were the prequel to the Internet-based companies that are so popular today. Decisions involving mail-order companies provided some insight into how to navigate the

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151. *Id.*

152. *Id.*

153. *Id.*

154. LULUS, <https://www.lulus.com> (last visited Oct. 30, 2018).

155. IPSY, <https://ipsy.com> (last visited Feb. 5, 2018).

156. *Id.*

157. *Id.*

158. *Id.*

159. *See id.*

160. ETSY, <https://etsy.com> (last visited Feb. 5, 2018).

161. *Id.*

162. *Id.*

163. *Id.*

164. *See Crutchfield Corp. v. Testa*, 88 N.E.3d 900, 902-03 (Ohio 2016).

dormant Commerce Clause issues, but they still are not an exact roadmap. Technology has allowed the basic business model structure to evolve. There are significant differences between mail-order companies and Internet-based companies, including marketing and payment activities. The major difference is that mail-order companies used to have to target customers directly based, at least partly, on location by physically mailing them advertisements or catalogs; however, Internet-based companies can target customers directly through the Internet. In fact, the Supreme Court has established intentionally targeting customers as a factor in the Due Process analysis to establish sufficient contacts.<sup>165</sup> Today, however, it is possible for an advertisement to end up in a state the company did not intentionally target.

While companies can still advertise to target specific states, they can now target specific individuals without concern for where those individuals live. For example, search engine optimization is “[a] structured approach used to increase the position of a company or its products in search engine natural or organic results listings (the main body of the search results page) for selected keywords or phrases.”<sup>166</sup> In other words, companies can target customers based on the search terms they use.<sup>167</sup> Social media marketing is also a large portion of online advertising.<sup>168</sup> Here, companies develop social media pages and allow customers to interact with the brand and other customers.<sup>169</sup> These forms of marketing do not focus on the geographic location of the customer, but on customers’ preferences and actions.<sup>170</sup>

Another option is e-mail marketing, where companies compile lists from customers in order to develop relationships.<sup>171</sup> These are often in the form of advertisements and deal emails companies send to potential customers to entice them into making a purchase.<sup>172</sup> There are two ways a customer can “opt-in” for advertisements, including “Single Opt-in” and “Double Opt-in,” also known as “Confirmed Opt-in.”<sup>173</sup> “Single Opt-in” requires subscribers merely to

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165. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).

166. CHAFFEY, *supra* note 146, at 20.

167. *Id.*

168. *Id.* at 21.

169. *Id.*

170. *Id.*

171. Susan Ward, *What is Email Marketing? Email Marketing Can Be Very Effective Marketing for Small Business*, BALANCE SMALL BUS. (Oct. 30, 2018), <https://www.thebalancesmb.com/email-marketing-2948346>.

172. *Id.*

173. Ralph F. Wilson, *Spam, Spam Bots, and Double Opt-in E-mail Lists*, PRACTICAL ECOMMERCE (Apr. 21, 2010), <https://www.practicalecommerce.com/wilson-double-optin>.

insert their e-mail address in a subscription form and press “enter.”<sup>174</sup> “Double Opt-in” or “Confirmed Opt-in” requires both submission of an e-mail address and confirmation, usually achieved through a link sent to the submitted e-mail.<sup>175</sup> Most retail websites will have an option that allows users to set up an account.<sup>176</sup> When the account is set up, the user must submit an e-mail address.<sup>177</sup> Companies will either automatically opt-in the account holder, and provide a way to opt-out if preferred, or customers can select a box allowing them to opt-in.<sup>178</sup> With this changing environment, it is time to question whether or not business privilege taxes imposed on Internet-based companies are unconstitutional under *Complete Auto*, and if there is a constitutional way to impose these taxes.

III. THE CURRENT IMPOSITION OF BUSINESS PRIVILEGE TAXES  
ON INTERNET-BASED COMPANIES IS UNDULY BURDENSOME ON  
INTERSTATE COMMERCE AND SHOULD BE HELD  
UNCONSTITUTIONAL.

State business privilege taxes imposed on Internet-based companies, whose only contacts with the state are through the mail system, are unconstitutional under *Complete Auto* because of the significant burden they impose on interstate commerce. First, these taxes do not meet the substantial nexus portion of *Complete Auto*<sup>179</sup> because, even under *Wayfair*, the only nexus these companies have with their customers is communication via the Internet. In fact, because of technological changes, they have less nexus in general than even *National Bellas Hess* had. The insufficient physical activity in *National Bellas Hess* was mailing catalogs and advertisements;<sup>180</sup> however, now, companies do not even have to physically send advertisements into a specific state, or even target a specific state at all. Instead, companies place advertisements in e-mails, on social media platforms, or on search engines, and customers visit the company websites. Unlike in *Tyler Pipe* and *National Geo-*

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174. *Id.*

175. *Id.*

176. *See, e.g., LULUS, supra* note 154.

177. *Id.*

178. *Id.*

179. *Quill Corp. v. North Dakota*, 504 U.S. 296, 314 (1992), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

180. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 754 (1967), *overruled by* *Wayfair*, 138 S. Ct. 2080.

*graphic Society*, these companies do not even have independent contractors or associates who generate gross-receipts in the state,<sup>181</sup> and therefore there is no in-state activity that leads to revenue generation.

The argument has been made that the physical presence test is unworkable and is inconsistent with a test balancing the interaction between the company and the state.<sup>182</sup> For example, when comparing Internet-based companies to traditional mail-order companies, Pamela Swidler argues that a balancing test is inconsistent with the physical presence test.<sup>183</sup> The two tests, however, are not inconsistent. A court could require a physical presence, while still balancing how significant that presence is against the tax imposed. The overruling of the physical presence test is not the end of the issue because we still do not have an answer of what constitutes a substantial nexus. The policy behind the substantial nexus requirement is that the corporations affording themselves of the benefits of the state pay their fair share of the burdens on that state.<sup>184</sup> A physical presence in a state presents much more of a burden on that state than a virtual one, and no intentional avilment of the market presents even a slighter burden on the state. Therefore, there must be at least some kind of intentional avilment of state resources, otherwise the corporations are being taxed for the activities of their customers and not their own use of state resources.

In *National Geographic*, the slightest presence was not enough to establish a substantial nexus.<sup>185</sup> There is no specific test showing when a substantial nexus exists, but it can hardly be said that a business that has no sales associates in the state, has no offices in the state, conducts no business on property in the state, and does not intentionally advertise in the state could have a substantial nexus with the state. The only connection is that a customer happened to have the product shipped to the state. There is really no slighter presence, other than a customer simply viewing the website using a computer within the state.

The cost of complying with potentially fifty different state tax codes would be highly burdensome to companies. Technology has evolved to make it easier for companies to handle compliance with

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181. See *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 249 (1992); see also *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 552 (1977).

182. Pamela Swidler, *The Beginning of the End to a Tax-Free Internet: Developing an E-Commerce Clause*, 28 CARDOZO L. REV. 541, 578 (2006).

183. *Id.* at 571.

184. CHEMERINSKY, *supra* note 14, at 481.

185. *Nat'l Geographic*, 430 U.S. at 556.

state taxes.<sup>186</sup> Data analytics is a huge part of the business world today, and it is benefitting many companies because companies can track countless trends, potentially including where customers are likely to order from and send products.<sup>187</sup> There is no way, however, for a company to be able to predict with certainty which state's business privilege taxes they would have to pay because states have varying definitions of what certain products are and if and how they are taxed.<sup>188</sup> It goes against any conception of fairness that the business should share in the miniscule burden on a state where they simply ship goods.

That is not to say that if the company is making a substantial profit from the state's consumer base, it should not be deemed to have a substantial nexus and bear a tax burden to those customers; however, the burden should be proportional. In *Wayfair*, respondents argued during oral argument that the average Internet sale is \$84, and at 200 transactions that only equals out to less than \$17,000 not the \$100,000 threshold South Dakota imposed.<sup>189</sup> Their point is that the requirements are highly inconsistent.<sup>190</sup> Further, South Dakota's economy is vastly different than that of a state like California or New York.<sup>191</sup> Two hundred transactions in either of those states equating to \$17,000 of gross income is not fairly comparable to their economies. States will likely be able to impose tax regimes that take advantage of Internet sellers and will burden burgeoning business by increasing compliance costs. Those regimes will likely widely vary, and will not provide consistent support proportionate to the use of the state market.

State business privilege taxes do not impose any greater cost on Internet-based companies than they do on local companies; however, they are still discriminatory because they tax the privilege of

186. See, e.g., QUICKBOOKS, <https://quickbooks.intuit.com> (last visited Nov. 25, 2018); TURBOTAX, <https://turbotax.intuit.com> (last visited Nov. 25, 2018).

187. *Data Analytics*, INVESTOPEDIA (Mar. 6, 2018), <https://www.investopedia.com/terms/d/data-analytics.asp>.

188. Transcript of Oral Argument at 45-46, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 2446095.

189. *Id.* at 55.

190. See *id.*

191. See *Gross Domestic Product by State*, BUREAU ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?ReqID=70&step=1#reqid=70&step=10&isuri=1&7003=200&7035=-1&7004=naics&7005=-1&7006=01000,02000,04000,05000,06000,08000,09000,10000,11000,12000,13000,15000,16000,17000,18000,19000,20000,21000,22000,23000,24000,25000,26000,27000,28000,29000,30000,31000,32000,33000,34000,35000,36000,37000,38000,39000,40000,41000,42000,44000,45000,46000,47000,48000,49000,50000,51000,53000,54000,55000,56000&7036=-1&7001=5200&7002=5&7090=70&7007=2017&7093=levels> (last visited Nov. 25, 2018).

doing interstate business. Online companies are selling to customers just as companies located within the state's borders are. The conglomeration of these taxes could be financially detrimental to a business, especially when that business may not be sophisticated enough to track the amount sold or shipped to each state; such as a seller on Etsy. Swidler claims that the physical presence requirement has the effect of burdening local retailers that operate physical stores in multiple states.<sup>192</sup> Her argument is that these local retailers must keep track of all the state taxes imposed on them, but because the online retailers do not qualify for taxation, they do not bear the cost of compliance.<sup>193</sup> The Court has already stated the Commerce Clause was not meant "to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."<sup>194</sup> Its not that Internet companies should be exempt from paying taxes, but that they should not pay taxes in states that they have a miniscule connection with.

Additionally, the Court has held that a tax on the privilege of doing interstate business is discriminatory.<sup>195</sup> The business conducted by Internet-based retailers is inherently interstate business. They are not conducting business in any state specifically, but in the virtual realm of the Internet. Further, to the extent that e-commerce could be considered a local activity, the activity is so inherent to interstate commerce that it should be afforded the protection of the Commerce Clause. *Memphis Natural Gas Co.* held that activities protected by the United States and not the state itself were considered beyond the boundaries of the state.<sup>196</sup> Mail services are one of the services protected by the United States government and not state governments.<sup>197</sup>

Lastly, privilege taxes on Internet-based companies are not fairly related to the protections provided by the state. These companies use almost no protection or services provided by the state. They are not even driving on the roads of the states; the mail trucks are. "[T]he *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state

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192. Swidler, *supra* note 182, at 569-70.

193. *Id.*

194. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (quoting *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

195. *See Memphis Nat. Gas Co. v. Stone*, 335 U.S. 80, 96 (1948).

196. *Id.* at 95.

197. *See generally* 39 U.S.C. § 101 (2008).

tax burden.”<sup>198</sup> The taxes imposed in these cases are not a “just share” of the state tax burden because the minimal extent of the companies’ contacts with the state impose, at best, a miniscule burden on those states.

IV. CONGRESSIONAL ACTION ESTABLISHING A MAXIMUM THRESHOLD FOR NEXUS AND CLARIFYING THE MANY DIFFERENCES AMONG STATE DEFINITIONS FOR INTERNET-BASED COMPANIES IS MUCH NEEDED, AND IT IS A BETTER WAY TO SUBJECT THESE COMPANIES TO TAXATION WHILE NOT UNDULY BURDENING INTERSTATE COMMERCE.

The dormant Commerce Clause only applies to those activities on which Congress has not spoken, but Congress has the power to establish guidelines for imposing gross-receipts taxes on Internet-based companies.<sup>199</sup> If Congress were to pass legislation on the privilege tax issue, then the analysis would fall squarely within the Commerce Clause of the Constitution.<sup>200</sup> Under the Commerce Clause, Congress can regulate channels of interstate commerce, instrumentalities of interstate commerce, and activities substantially affecting interstate commerce.<sup>201</sup> The Internet is an instrumentality used in interstate commerce, and could even be considered a channel. Congress would be well within its power to establish guidelines for Internet business privilege taxes, and such legislation would alleviate the difficulties that arise from state business privilege taxes on Internet-based companies.

In fact, Congress has demonstrated such power in the past regarding net income taxes with the enactment of Public Law 86-272:

Congress passed Public Law 86-272 in 1959 to protect out-of-state corporations from state income taxes when the corporation’s only in-state activity was salespeople soliciting sales from customers in the state. Nexus for net income tax purposes is not established merely because sales of tangible personal property are solicited within the states. The states are prohibited under Public Law 86-272 (P.L. 86-272) from imposing a net

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198. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (quoting *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

199. “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8, cl. 1.

200. U.S. CONST. art. I, § 8, cl. 3.

201. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

income tax on an out-of-state entity if the entity's only connection with the state is the solicitation of orders for tangible personal property, if those orders are accepted and shipped or delivered from outside the state.<sup>202</sup>

Not only does P.L. 86-272 demonstrate Congress's ability to impose guidelines and limits on a state's ability to tax out-of-state sellers, it also demonstrates Congress's willingness to do so. P.L. 86-272 currently does not apply to gross-receipts taxes; however, that does not mean that similar guidelines should not be imposed for gross-receipts taxes.

As for the legal benefits, a federal law would clear up much of the confusion surrounding this area of taxation. Internet sales place a much larger burden at the federal level than they do at the state level because most of the protections and services these e-commerce retailers are using are federal, not state. It follows policy that the tax should reimburse the cost of the burden on the federal government. Further, a federal law would alleviate the need to place state boundaries on the Internet. Finally, federal legislation would address the complex issue of not only the definition of substantial nexus, but also other definitions that are commonly different among states, such as the definition of a service or the definition of a specific type of good (i.e. candy bar, clothing, etc.).

The federal legislation would also provide for a better framework for Internet-based companies resulting in possible economic benefits. First, better compliance leads to higher investment in government programs, which is the purpose of taxation, and may lead to company investment in the marketplace.<sup>203</sup> "Good compliance outcomes begin with good legislation."<sup>204</sup> The federal guidelines would likely be complied with more than differing individual state taxes, and, therefore, would result in less court costs to resolve disputes. One federal law is much more easily complied with than fifty different state laws. When the law is ambiguous, it allows taxpayers to act in unintended ways, creating disputes over interpretation.<sup>205</sup> Therefore, where there is good, clear legislation, there is less enforcement and litigation costs. Where enforcement and litigation

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202. *AICPA State Tax Nexus Guide*, AM. INST. CERTIFIED PUB. ACCT. 2 (2014), <https://www.vataxus.com/pdf/AICPA.pdf>.

203. FORUM ON TAX ADMINISTRATION COMPLIANCE SUB GROUP, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMPLIANCE RISK MANAGEMENT: MANAGING AND IMPROVING TAX COMPLIANCE 70 (Oct. 2004), <https://www.oecd.org/tax/administration/33818656.pdf>.

204. *Id.* at 43.

205. *Id.*



costs are diminished, the government can spend more money funding government programs.

Second, when the law is clear, companies can more easily comply with it,<sup>206</sup> thereby reducing their compliance costs and investing back into their companies and the economy. Compliance costs are those costs that an individual incurs above the actual cost of the tax, and can include accounting costs and other indirect costs.<sup>207</sup> “Psychological” costs, like stress of compliance on the workforce, can also be a factor.<sup>208</sup> A federal tax would provide a much clearer requirement than multiple state laws. The direct compliance costs would be reduced because there would be less interpretation of multiple laws, and a better interpretation of one law. Companies would have more money to reinvest either into their products and people, or into the economy at large. The indirect costs, such as psychological costs, would be reduced because compliance is less complex, allowing the companies’ workforces to focus more on things such as new developments and business expansion. Better compliance means that expected revenues can be met and these Internet-based companies would be better able to foresee their annual taxation obligations. The money saved in compliance could be reinvested, providing more growth opportunity for a better e-commerce market, and potentially investment in the state.

## V. CONCLUSION

Under the current *Complete Auto* framework, state business privilege taxes on Internet companies whose only contacts with the state are the shipment of products to customers are an unconstitutional burden on interstate commerce. Congress should enact legislation that provides guidelines for state Internet business privilege taxes that would both clarify the legal landscape and provide economic benefits from greater compliance and reinvestment. The advancing technological society we live in today provides its own difficulties when interpreting the law, especially the dormant Commerce Clause. When the dormant Commerce Clause was first established, the Internet and the potential to do business without ever being present in the state was likely an inconceivable idea. While case law has tried to keep up with the changing e-commerce environment, it has not made the murky issue any clearer. This area of the law is likely not going to remain stagnant, but, instead,

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206. *Id.*

207. *Id.* at 37.

208. *Id.*

new technological advances will create more confusion. If no action is taken by Congress, the burden on interstate commerce will only get worse.

# Vermeer v. Pollock: A Case for the Expansion of Moral Rights in the United States<sup>1</sup>

*Nicoline A. van de Haterd\**

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1. This article will discuss the protection of moral rights under copyright law in both the Netherlands and the United States. In doing so, a comparison will be drawn between the level of protection provided in both countries. The title of this article is a nudge to that comparison by referencing two of the most well-renowned and influential artists of both countries. Johannes Vermeer (1632-1675) was one of the most influential Dutch painters during the Golden Age. Jackson Pollock (1912-1956) was an American painter and a major figure in the abstract expressionist movement.

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## I. INTRODUCTION

Imagine you are a sculptor and you created a sculpture to put on display in your front yard. One day your neighbor, who is an art director at a museum, knocks on your door. He saw the sculpture in your front yard, and he tells you that he likes your work of art and wants to buy it to display in the museum. Excited about the opportunity to exhibit your work, you agree. However, a week later you stop by the museum to look at your work and notice that the plaque on the wall does not list you as the maker of the work. Instead, the sculptor is listed as “Unknown.”

Under American copyright law, is there anything you can do? What if the museum lists you as the sculptor of the work, but decides to modify your sculpture by painting it red? Is there anything you can do? The answer to both questions is yes. Namely, as the author of a work, aside from copyright protection for infringement, you as the maker of a certain type of work receive protection in the form of “moral rights.”<sup>2</sup> Moral rights are rights that protect the integrity of the author’s work from modifications, in addition to providing the author with the right to be recognized as the creator of the work.<sup>3</sup> The former is also referred to as the “right of integrity,” while the latter is commonly known as the “right of attribution.”<sup>4</sup>

But what if you are not a sculptor, and are instead an architect—you design a building and once the building is built, the owner decides to change the façade of the building and seeks to implement further modifications. Can you, as the creator of the building, now act? Under United States copyright law the answer is no, as moral rights protection is not extended to architectural works.<sup>5</sup> Additionally, other forms of art, such as films or musical compositions, are also not granted moral rights protection in the United States.<sup>6</sup> Conversely, under Dutch law *any* copyrightable work is granted moral rights protection.<sup>7</sup>

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2. See LYDIA P. LOREN & JOSEPH S. MILLER, *INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS* 425 (5th ed. 2017).

3. *Id.* at 323.

4. *Id.* For a further discussion on moral rights see *infra* Section II-B.

5. See 17 U.S.C. §§ 101, 106A (2012).

6. *Id.*

7. See Articles 1, 10 and 25 Auteurswet [Copyright Act] (Neth.).

### A. *History of Dutch Copyright Law*

For as small as the country is, the Netherlands<sup>8</sup> has played a significant role in the history of art in Continental Europe. While Dutch art started to make a name in Europe as early as the Fifteenth and Sixteenth Centuries, it really flourished during the Seventeenth Century, also known as the Dutch Golden Age.<sup>9</sup> During the Golden Age, the Netherlands experienced an enormous growth in trade, science, and the arts. Between five and ten million works of art had been produced in the Netherlands during this period, although less than one percent actually survived.<sup>10</sup> After the Eighty Years' War with Spain ended in 1648, the country "emerged as a vital new political, economic, and cultural force."<sup>11</sup> The sudden growth in the production of art is often attributed to the economic growth the country experienced during this time period.<sup>12</sup> In addition, while art was initially seen as a luxury only affordable to the elite, during the Seventeenth Century art became part of the common Dutch household.<sup>13</sup>

Following the Golden Age and the growth of Dutch art and the Dutch art market, the need to recognize the efforts of creators grew. In 1803, the Dutch enacted their first national legislation, through the *Boekenwet van 1803*,<sup>14</sup> to protect the *publisher*, not the author, against unlawfully made copies of the printed work.<sup>15</sup> A similar law had already been in force in the northern parts of the Netherlands since 1796.<sup>16</sup> The *Boekenwet* was soon followed by the first national law governing copyright protection in general, the Dutch Copyright Act of 1817.<sup>17</sup> In 1881, a newer version of the Dutch Copyright Act

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8. The Kingdom of the Netherlands is home to over 17 million people yet its slightly less than twice the size of the State of New Jersey. *The World Factbook, Europe: Netherlands*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html> (last updated Jan. 16, 2019).

9. *A Brief Overview of the Dutch Art Market in the Seventeenth Century*, ESSENTIAL VERMEER, [http://www.essentialvermeer.com/dutch-painters/dutch\\_art/ecnmcs\\_dtchart.html#WmIAUZM-f3R](http://www.essentialvermeer.com/dutch-painters/dutch_art/ecnmcs_dtchart.html#WmIAUZM-f3R) (last visited Feb. 11, 2018).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Translation in English: The Booklaw of 1803.

15. CHRIS F. SCHRIKS, HET KOPIJRECHT, 16DE TOT 19DE EEUW [Copyright from the Sixteenth till Nineteenth century] 951-52 (2010).

16. *Id.* at 862, 864 (The Province of Holland revised its original decree of 1795 into the law of 1796, providing the province with its first definitive "Book law." The law was mainly focused on the book trade and sought to provide the publisher with the right to protect original works to which he held the "copyright").

17. *Id.* at 1264; *see also id.* at 1266 (Although expectations were high, when it came to the execution of the law, the northern parts of the Netherlands treated it primarily as before,

came into force.<sup>18</sup> However, in 1912, an updated copyright law, the Copyright Act of 1912, was enacted based on the Berne Convention<sup>19</sup> of 1886.<sup>20</sup> This act is still the law in the Netherlands today, although in the past decades, the law was amended to take modern changes and technologies into account.<sup>21</sup> In 2008, because the Copyright Act of 1912 had gone through several amendments, the Dutch legislature decided to remove any reference to its original enactment date and now the Act is simply referred to as the “Copyright Act.”<sup>22</sup>

The Netherlands has a rich art history. From as early as the Fifteenth Century with Hieronymus Bosch, to the Dutch masters of the Golden Age—Rembrandt van Rijn, Jan Steen and Johannes Vermeer, and more modern artists such as Vincent van Gogh and Piet Mondriaan—the country continuously has been on the forefront of the development of art and recognizing the rights of authors. An important aspect of copyright and the recognition of author’s rights are moral rights. While moral rights protection in Europe in general is broader than in the United States,<sup>23</sup> the Netherlands provides for a good middle ground between the countries. As will become evident throughout this article, the Netherlands affords for a broader level of moral rights protection than the United States by providing moral rights protection for more types of art than just “fine art.” Furthermore, the Netherlands’ moral rights protection is not as broad as some countries’, such as France’s or Germany’s. Therefore, considering the Dutch’s centuries-old leading role in the creation of art and its moderate approach to the protection of authors’ rights, the Netherlands forms an excellent point of reference to change the way the United States views and protects moral rights of integrity and attribution.

### *B. United States Copyright Office Notice*

On January 23, 2017, the United States Copyright Office issued a notice in which it requested comments from the public on how

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not as a law protecting authors, but as a law protecting publishers. The south of the Netherlands adhered more to the French approach).

18. D.W.F. VERKADE, T&C IE, COMMENTAAR OP AANHEF AUTEURSWET [Commentary on the exordium to the Dutch Copyright Act] para. 1 (2017) (Neth.).

19. See discussion *infra* at Section II-B-i.

20. VERKADE, *supra* note 18.

21. *Id.* at para. 1, 3.

22. *Id.* at para. 1.

23. LOREN & MILLER, *supra* note 2, at 323.

existing United States laws protect the moral rights of authors.<sup>24</sup> The Copyright Office's request is part of a public study that reviews the current state of U.S. law recognizing and protecting the moral rights of attribution and integrity.<sup>25</sup> As part of its study, the Copyright Office "will review existing law on the moral rights of attribution and integrity, including provisions from Title 17 of the United States Code as well as other federal and state laws," and determine whether any additional protection would be advisable.<sup>26</sup> To support the Office's research and to provide thorough assistance to Congress, the Copyright Office has enlisted the public for input on several questions.<sup>27</sup>

In 2014, as part of a review of U.S. copyright law, members of the Subcommittees on Courts, Intellectual Property and the Internet, of the House Judiciary Committee, held a hearing in which they expressed an interest in evaluating the status of protection of moral rights of authors in the United States as part of its review of U.S. copyright law in general.<sup>28</sup> In particular, the Chairman of the House Judiciary Committee noted that the focus should be on whether the current law sufficiently protects the moral rights of authors, or whether more explicit protection is required.<sup>29</sup> At the end of the two-year copyright review hearings process, it was recommended that the United States Copyright Office conduct a study on the current status of moral rights protection laws in the United States and whether any changes would be necessary and appropriate.<sup>30</sup>

In preparation for this study, the Copyright Office co-hosted a symposium on moral rights in April 2016 to hear views about current issues in this area and to serve as the start of the Copyright Office's public study.<sup>31</sup> Discussions included the history of moral rights, the value of moral rights for authors, protection under the current law, and considerations for the digital age.<sup>32</sup> Participants varied from academic scholars to professional artists, musicians, and performers.<sup>33</sup> The right of attribution was identified by many participants as important for authors from both an economic and

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24. *Study on the Moral Rights of Attribution and Integrity*, 82 Fed. Reg. 7870, 7870 (Jan. 23, 2017).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 7871.

29. *Id.*

30. *Id.*

31. *Id.* at 7871, 7874.

32. *Id.* at 7874.

33. *Id.*

personal perspective.<sup>34</sup> However, opinions varied as to the sufficiency of protection under the current law. Several participants found the existing law to be limited, strict, and under-inclusive, while other participants found the current patchwork of laws to provide adequate protection.<sup>35</sup> Another point of focus was moral rights protection and litigation in foreign countries.<sup>36</sup>

The Copyright Office's notice sought public comments on a variety of topics, including the effectiveness of the Digital Millennium Copyright Act (DMCA) and Visual Artists Rights Act (VARA) in the promotion and protection of moral rights in the United States, whether any improvements should be made to the DMCA or VARA, and how foreign countries approach the protection of moral rights and if they can be implemented in the United States.<sup>37</sup>

### C. *Scope of Article*

The premise of this article is that the moral rights of authors in the United States are currently not sufficiently protected and that additional protection is necessary by implementing aspects of moral rights protection from the Netherlands. Compared to the United States, Europe has traditionally offered a broader scope of protection of moral rights of authors and artists.<sup>38</sup> However, within Europe, the scope of protection of moral rights varies as the European Union has not harmonized its laws regarding moral rights protection.<sup>39</sup> This means that apart from the minimum requirements set out by the Berne Convention,<sup>40</sup> every country has its own legislation regarding the recognition and protection of moral rights for authors.

The Netherlands provides for a good middle ground in the recognition and protection of moral rights. Through the *Auteurswet*,<sup>41</sup> the Netherlands provides for a broader scope of protection than the United States, but is not as unlimited as, for instance, France.<sup>42</sup>

This article will focus on three elements of a notice by the United States Copyright Office regarding the protection of moral rights in

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 7874-75; see also *Study on the Moral Rights of Attribution and Integrity*, COPYRIGHT.GOV, <https://www.copyright.gov/policy/moralrights/> (last visited Feb. 11, 2017).

38. See generally 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02 at 1-2 (2018).

39. See generally GUY TRITTON ET AL., INTELLECTUAL PROPERTY IN EUROPE 469 (3rd ed. 2008).

40. See discussion *infra* Section II-B.i.

41. *Auteurswet* [Copyright Act] 1912 (Neth.).

42. See discussion *infra* Section IV.



the United States: the effectiveness of the VARA and DMCA in the promotion and protection of moral rights in the United States; how moral rights are protected in the Netherlands; and improvements that should be made to existing U.S. law by looking at how Dutch law can be implemented in the United States. In particular, this article will advocate that existing U.S. law governing the protection of moral rights should be extended, using the Netherlands as a reference.

The article will begin by briefly explaining copyright, moral rights, and the types of moral rights. Second, there will be an explanation of existing copyright and moral rights law in the United States by discussing the VARA and DMCA. Third, the article will discuss how moral rights are protected in the Netherlands. Fourth, the article will look at cases and examples from the two “main” areas of copyright law, and will discuss how such cases are handled in the United States compared to the Netherlands. Fifth, following the comparison between both systems, the article will discuss proposed changes to existing United States law.

## II. COPYRIGHT AND MORAL RIGHTS

### A. *What is a Copyright?*

The United States Constitution specifically affords protection to the creators of the sciences and arts in the form of copyrights and patents.<sup>43</sup> Copyright law protects works of authorship.<sup>44</sup> Ownership of a copyright vests originally in the author, or authors, of the work.<sup>45</sup> Protection arises automatically when three criteria are met: the work must be original, fixed in a tangible medium of expression, and must consist of “expressions” rather than ideas.<sup>46</sup> Once an original work of authorship is fixed in a tangible medium of expression, a copyright exists.<sup>47</sup> The Copyright Act considers a broad range of works of authorship, including literary works, musical works, dramatic works, pictorial, graphic and sculptural works, motion pictures, sound recordings, and architectural works.<sup>48</sup> However, copyright protection for an original work of authorship is not

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43. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

44. CRAIG ALLEN NARD ET AL., *THE LAW OF INTELLECTUAL PROPERTY* 435 (4th ed. 2014).

45. 17 U.S.C. § 201 (2012); *see also* LOREN & MILLER, *supra* note 2, at 364.

46. 17 U.S.C. § 102 (1990); *see also* NARD ET AL., *supra* note 44, at 435.

47. LOREN & MILLER, *supra* note 2, at 364.

48. 17 U.S.C. § 102 (1990).

extended to abstract things such as ideas, procedures, processes, systems, concepts, or methods of operation, regardless of how it is described or explained in the work.<sup>49</sup> In addition, a copyright requires no registration, notice, or distribution of copies of the work in order to obtain the rights granted by the federal Copyright Act.<sup>50</sup> This protection only applies to works created on or after January 1, 1978, the effective date of the Copyright Act.<sup>51</sup> Prior to the enactment of the Copyright Act of 1978, there were cumbersome requirements on authors to register their copyright, provide notice of copyright upon initial publication, and renew to prevent the work from entering the public domain, depending on whether the work was protected by common law copyright or statutory copyright, and published or unpublished.<sup>52</sup>

The copyright holder is granted a bundle of rights along with the copyright. Under the Copyright Act, the copyright holder is granted exclusive rights to exclude others from reproducing the copyrighted work, to create derivative works based on the copyrighted work, to distribute copies of the copyrighted work to the public, and to publicly perform or display the copyrighted work.<sup>53</sup>

### *B. What are Moral Rights?*

Moral rights are rights that provide the creator of a work with the right to protect the artistic integrity of their work.<sup>54</sup> Rather than viewing copyright as a property right, copyright is viewed as a way to protect expressive content as an extension of the creator, by providing the creator with the right to control that expression.<sup>55</sup> The term “moral rights” comes from the French phrase *droit moral*, and refers to a certain set of non-economic rights that are considered to be personal to the author.<sup>56</sup> Moral rights should be distinguished from the economic rights granted in § 106, and the personal property rights of the owner of a particular copy of the work.<sup>57</sup> Moral rights are personal to the author. Furthermore, pursuant to § 106A(e)(1), moral rights cannot be transferred, although they can be waived.<sup>58</sup>

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49. *Id.*

50. LOREN & MILLER, *supra* note 2, at 364.

51. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16 at 1 (2018).

52. *Id.* at 2-5.

53. 17 U.S.C. § 106 (2002); *see also* LOREN & MILLER, *supra* note 2, at 321.

54. LOREN & MILLER, *supra* note 2, at 323.

55. *Id.*

56. *Study on the Moral Rights of Attribution and Integrity*, *supra* note 24, at 7870.

57. LOREN & MILLER, *supra* note 2, at 426.

58. 17 U.S.C. § 106A(e)(1) (1990); *see also* LOREN & MILLER, *supra* note 2, at 426.

Many European countries have based their copyright law on this rationale, granting copyright protection for moral rights, such as the right to protect the integrity of the expression from modification and the right of attribution, which gives the creator the right to be recognized as the creator of a work.<sup>59</sup> Protection of moral rights in the United States is limited to “works of visual art” as defined in § 101, which is more limited than European copyright law, and are granted to authors pursuant to § 106A.<sup>60</sup>

### 1. *The Berne Convention*

In 1887, to combat the undue complexity and uneven protection of copyright on artistic and literary works created by bilateral agreements, several countries ratified the Berne Convention for the Protection of Literary and Artistic Works of 1886.<sup>61</sup> The Berne Convention was created with the idea that the contracting countries would not discriminate between domestic authors and authors of other contracting countries regarding the level of protection they enjoyed for their artistic and literary works.<sup>62</sup> In addition, the objective was to harmonize copyright laws between the contracting states, while at the same time allowing matters like enforcement and protection of copyrights to remain a matter of national law.<sup>63</sup> The Berne Convention has been revised numerous times since its creation in 1886.<sup>64</sup> Initially, the Convention did not contain a provision on moral rights.<sup>65</sup> However, in 1928, following the Conference of Rome, the Convention was revised and Article 6*bis* on moral rights was included.<sup>66</sup>

Article 6*bis* provides that, apart from the economic rights provided to the author of an artistic or literary work, the author also

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59. LOREN & MILLER, *supra* note 2, at 323.

60. 17 U.S.C. §§ 101, 106A (2012); LOREN & MILLER, *supra* note 2, at 323; *see also infra* Section III-A discussion of the Visual Artists Rights Act of 1990 and the Act’s scope of application.

61. TRITTON ET AL., *supra* note 39, at 468-69 (Originally, contracting parties included countries such as Belgium, France, Germany, Italy, Luxembourg, Monaco, the Netherlands, Norway, Spain and Sweden.); *see also* WIPO-Administered Treaties, *Contracting Parties Berne Convention*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/treaties/en/Show-Results.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/Show-Results.jsp?lang=en&treaty_id=15) (last visited Apr. 7, 2018) (Throughout the years numerous countries all over the world have ratified or acceded to the Berne Convention, such as Japan, Afghanistan, Jordan, Canada, India, Nigeria, South-Africa and the United States).

62. TRITTON ET AL., *supra* note 39, at 469.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

enjoys certain moral rights.<sup>67</sup> The author has the right to claim authorship of the work; object to any distortion, mutilation, or other modification of his work; or any other derogatory action in relation to his work that will be prejudicial to the author's honor and reputation.<sup>68</sup> Essentially, Article 6*bis* recognizes two main moral rights: the right of attribution and the right of integrity.<sup>69</sup> Notably, the right of integrity, "to object to any distortion, mutilation, or other modification," does not extend to the level of protection of some countries where the right of integrity includes the right to object to the outright destruction of the work.<sup>70</sup> "[T]here can be no distortion when the work itself has been" destroyed.<sup>71</sup> Further, Article 6*bis* of the Berne Convention provides that moral rights can be enforced after the author's death by those responsible for administration of the copyright, which is left to the national legislation of the contracting countries.<sup>72</sup>

### III. MORAL RIGHTS IN THE UNITED STATES

Unlike many other countries, the United States has not adopted broad moral rights provisions as part of its federal copyright statute, the Copyright Act.<sup>73</sup> Rather, the protection of moral rights in the United States is comprised of a combination of federal and state statutes and common law.<sup>74</sup> Even within this limited body of legislation, protection of moral rights is further narrowed, as the United States only recognizes protection of moral rights for the visual arts such as paintings, sculptures, and photographs.<sup>75</sup> Both federal and state laws solely provide protection for a very limited scope within the visual arts, and do not apply to any other copyrightable subject matter.<sup>76</sup>

In contrast, most of Continental Europe has a broader form of moral rights protection, providing protection for a broad range of works of authorship, including, for instance, literary, musical, and graphic works.<sup>77</sup> The difference between moral rights protection in

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67. See *Berne Convention for the Protection of Literary and Artistic Works*, art. 6*bis*, WORLD INTEL. PROP. ORG., [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698) (last visited Feb. 11, 2018).

68. *Id.*; see also TRITTON ET AL., *supra* note 39, at 474.

69. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01 at 3 (2018).

70. *Id.*

71. NIMMER & NIMMER, *supra* note 38, at 8.

72. TRITTON ET AL., *supra* note 39, at 474.

73. *Study on the Moral Rights of Attribution and Integrity*, *supra* note 24, at 7871.

74. *Id.*

75. NIMMER & NIMMER, *supra* note 38, at 2; see also 17 U.S.C. §§ 101, 106A (2012).

76. NIMMER & NIMMER, *supra* note 38, at 2.

77. *Id.* at 1-2.

the United States and Continental Europe is striking, especially since Congress amended the Copyright Act in 1988 to comply with the Berne Convention.<sup>78</sup> What is notably important is that in the United States, moral rights do exist, yet do not rise to the level of protection as set forth by Article 6*bis* of the Berne Convention.<sup>79</sup> This section will focus on United States federal law protecting moral rights. In particular, this section will discuss the protection of moral rights under both the Visual Artists Rights Act (VARA) and the Digital Millennium Copyright Act (DMCA).

#### A. *Visual Artists Rights Act (VARA)*

In 1990, Congress passed the Visual Artists Rights Act, codified in § 106A of the Copyright Act.<sup>80</sup> Section 106A provides for an additional set of rights to the author of a work of visual art, often referred to as the moral rights of attribution and integrity.<sup>81</sup> As mentioned previously, the United States' protection of moral rights is very narrow.<sup>82</sup> In fact, the definition of a "work of visual art" is extremely detailed and defined as "a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."<sup>83</sup> Further, the definition specifically excludes an extensive list of works from the definition, such as posters, models, applied art, motion pictures, books, merchandising items or advertising, and many other works.<sup>84</sup>

For the select group of works that do qualify as a work of visual art, § 106A grants the authors of such works the rights of attribution and integrity.<sup>85</sup> The right of attribution includes the right of the author to "claim authorship to that work, and . . . to prevent the use of his or her name as the author of any work of visual art which he or she did not create."<sup>86</sup> In addition, the author has the right to "prevent the use of his or her name as the author of the work of

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78. *Id.* at 3. While the difference in moral rights protection between Continental Europe and the United States is interesting considering the fact that both are signatories to the Berne Convention, this in and of itself constitutes a discussion for a law review article and therefore is not within the scope of this article.

79. *Id.* at 9.

80. LOREN & MILLER, *supra* note 2.

81. *Id.*

82. NIMMER & NIMMER, *supra* note 38, at 2; *see also* 17 U.S.C. §§ 101, 106A (2012).

83. 17 U.S.C. § 101 (2012) (defining a "work of visual art").

84. *Id.*

85. *Id.* § 106A.

86. *Id.* § 106A(a)(1).

visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”<sup>87</sup>

The right of integrity is more narrowly defined.<sup>88</sup> Under VARA, the author has the right “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.”<sup>89</sup> Additionally, an author has the right “to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”<sup>90</sup> From reading § 106A of the Copyright Act, it is clear that the protection of moral rights in the United States is very limited in its scope.

### *B. Digital Millennium Copyright Act (DMCA)*

Beside the Berne Convention, the United States has joined two additional international treaties that provide for the protection of moral rights: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).<sup>91</sup> While the WCT incorporated Article 6*bis* of the Berne Convention, Article 5 of the WPPT expanded the obligations of contracting parties towards recognizing the moral rights of attribution and integrity for performers of live performances and performances fixed in phonograms.<sup>92</sup> In order to comply with its obligations under both treaties, the United States enacted the Digital Millennium Copyright Act (DMCA).<sup>93</sup> The enactment of the DMCA led to the addition of Chapter 12 to Title 17, entitled “Copyright Protection and Management Systems” and contains § 1202, which provides protection for copyright management information.<sup>94</sup>

Section 1202 prohibits knowingly and intentionally providing false copyright management information, or the distribution or import of false copyright management information.<sup>95</sup> Additionally, the provision also prohibits the removal or alteration of copyright

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87. *Id.* § 106A(a)(2).

88. LOREN & MILLER, *supra* note 2.

89. 17 U.S.C. § 106A(a)(3)(A) (2012).

90. *Id.* § 106A(a)(3)(B).

91. *Study on the Moral Rights of Attribution and Integrity*, *supra* note 24, at 7872.

92. *Id.*

93. *Id.*; 17 U.S.C. § 1202 (1999).

94. *Study on the Moral Rights of Attribution and Integrity*, *supra* note 24, at 7872-73.

95. 17 U.S.C. § 1202(a) (1999).

management information.<sup>96</sup> While facilitating the administration of the economic rights of an author or right holder, the copyright management information protections provided by § 1202 may also have implications on the protection and enforcement of an author or right holder's moral rights.<sup>97</sup> When it comes to moral rights protection, of particular interest is the second prohibition on removal or alteration of copyright management information.

The DMCA's definition of copyright management information entails any of the forms of information listed in § 1202(c) that are "conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form," such as "the name of, and other identifying information about, the author of a work."<sup>98</sup> Therefore, § 1202 makes it an offense to intentionally remove or alter any mention of the author's name of the work, essentially providing for the protection of the moral right of attribution.<sup>99</sup> By including the author's name in the scope of protection under § 1202, it seems to suggest that United States copyright law recognizes a right of attribution not just for authors of "works of visual art" under VARA, but for authors of all works.<sup>100</sup> However, the reality appears a little more complicated, with the majority of courts recognizing § 1202 as protection against any removal of an author's attribution, but with a minority only recognizing protection against removal for attribution that is digital or part of an automated copyright protection or management system.<sup>101</sup>

#### IV. MORAL RIGHTS IN THE NETHERLANDS: THE DUTCH COPYRIGHT ACT

As the above discussion on the Berne Convention has shown, moral rights in Europe are not harmonized. The language of Article 6bis provides the signatory countries with a broad level of discretion regarding the implementation of moral rights in their respective countries.<sup>102</sup> This level of freedom has, even within Europe, led to differences in the national approaches of moral rights protection.

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96. *Id.* § 1202(b)(1).

97. *Study on the Moral Rights of Attribution and Integrity*, *supra* note 24, at 7873.

98. 17 U.S.C. § 1202(c)(2).

99. *See id.* § 1202(b)(1), (c)(2) (1999).

100. *See* Jane C. Ginsburg, II, *Art and the Law: Suppression and Liberty Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 12 (2001).

101. *Study on the Moral Rights of Attribution and Integrity*, *supra* note 24, at 7873.

102. *See, e.g., Berne Convention for the Protection of Literary and Artistic Works*, art. 6bis, *supra* note 67, art. 6bis(3) (stating that "the means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed").

The Netherlands acceded to the Berne Convention in October 1912.<sup>103</sup> A month earlier, the Netherlands enacted the *Auteurswet*, the Dutch Copyright Act.<sup>104</sup> In line with Article 6*bis* of the Berne Convention, Article 25 of the Dutch Copyright Act provides for the protection of *persoonlijkheidsrechten*, or moral rights.<sup>105</sup> Article 25(1)(a) sets forth the right of attribution, providing the author with the right to object to making the work public without any mention of his name or reference to indicate that the author created the work, unless his objection is unreasonable.<sup>106</sup> This includes the right to object to any publication of the work under a different name than that of the original author, as well as changes to the title of the work itself or any reference of the author on the work.<sup>107</sup>

The right of integrity under Dutch Copyright law consists of two aspects. First, it provides the author with the right to object to any modification to the work, unless such modification is reasonable.<sup>108</sup> Second, the author always has the right to object to any distortion, mutilation, or any other form of deterioration of the work which could negatively impact the honor or name of the author, or value in its position as the author of the work.<sup>109</sup> Therefore, even if distortion or mutilation of the work can be proved, the author must also show that his name, honor, or reputation as an artist has been negatively impacted because of the distortion or mutilation of his work.<sup>110</sup> While under Dutch law, the author has to show a detrimental impact, this extra requirement is not present under either French or German law.<sup>111</sup> In the end, the distinction between whether a change to the work is a modification or distortion is a subjective one.<sup>112</sup> However, in 2004, the Dutch Supreme Court in *Jelles* held that “mutilation or any other form of deterioration” does *not* include the actual total destruction of the work.<sup>113</sup> Yet in

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103. *WIPO-Administered Treaties, Contracting Parties Berne Convention*, *supra* note 61.

104. *See* exordium to the *Auteurswet* [Copyright Act] 1912 (Neth.).

105. Article 25 *Auteurswet* [Copyright Act] (Neth.).

106. Article 25(1)(a) *Auteurswet*.

107. Article 25(1)(b) *Auteurswet*.

108. Article 25(1)(c) *Auteurswet*.

109. Article 25(1)(d) *Auteurswet*.

110. D.W.F. VERKADE, T&C IE, COMMENTAAR OP ARTICLE 25 AUTEURSWET [Commentary on Article 25 of the Dutch Copyright Act] para. 4 (2017) (Neth.).

111. *See* Article L121-1 Code de la propriété intellectuelle (1992) (Fr.); *see also* Section 14 *Enstellung des Werkes*, *Urheberrechtsgesetz* (1965) (Ger.).

112. VERKADE, *supra* note 110.

113. *Id.*; *see also* HR 6 februari 2004, ECLI:NL:PHR:2004:AN7830 (*Jelles/De Gemeente Zwolle*) (Neth.), at para. 4.5.



France, the author can object to the destruction of his work.<sup>114</sup> More surprisingly perhaps is that under § 106A(3)(B) of VARA, an author also has the right to object to the destruction of a work of recognized stature.<sup>115</sup>

Moral rights under Dutch law are non-transferable.<sup>116</sup> Even after the original author transfers his or her copyright, the moral rights remain with the original author.<sup>117</sup> In other words, when the author parts with their copyright, moral rights are not included.<sup>118</sup> In addition, moral rights in the Netherlands are not perpetual—they are not automatically passed on to heirs after the author's death.<sup>119</sup> However, the author can elect to have his rights pass on through testament.<sup>120</sup> Furthermore, an author can waive his or her rights away by contract.<sup>121</sup> Contrastingly, while in France moral rights are also considered non-alienable, they are considered to be perpetual, in that the rights pass on to the heirs of the author, are imprescriptible, and cannot be waived.<sup>122</sup> In Germany, moral rights are inheritable, but not transferable, unless transferred in execution of a testamentary disposition or to co-heirs as part of the partition of an estate.<sup>123</sup>

## V. COMPARISON – CASE STUDIES

To show the difference in treatment of moral rights of authors in the United States versus the Netherlands, two separate examples will be discussed. The first example will discuss moral rights protection in the context of visual arts, more specifically architecture. The second example will discuss moral rights in the context of musical compositions.

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114. See André Lucas, *Moral Right in France: Towards a Pragmatic Approach?*, BRITISH LITERARY & ARTISTIC COPYRIGHT ASS'N, <http://www.blaca.org/Moral%20right%20in%20France%20by%20Professor%20Andre%20Lucas.pdf> (last visited Feb. 11, 2018).

115. 17 U.S.C. § 106A(3)(B) (2012) (subject to the limitations set out in *id.* § 113(d)).

116. VERKADE, *supra* note 110, at para. 1a.

117. Article 25(1) Auteurswet.

118. VERKADE, *supra* note 110, at para. 1a.

119. *Id.* at para. 6.

120. Article 25(2), (4) Auteurswet.

121. VERKADE, *supra* note 110, at para. 1b (Under Dutch contract law the author is able to transfer his rights under Article 25 to another contracting party.).

122. Article L121-1 Code de la propriété intellectuelle (Fr.); see also Lucas, *supra* note 114.

123. See Section 28-29 *Enstellung des Werkes*, Urheberrechtsgesetz (Ger.).

### A. Visual Arts – Architecture

In 1820, Naturalis Institute was established as the *Rijksmuseum van Natuurlijke Historie*,<sup>124</sup> in Leiden, the Netherlands.<sup>125</sup> The initial focus of the institute was on scientific research and building a collection, rather than exhibitions.<sup>126</sup> In 1986, the decision was made to turn the institute in a museum for the public, and the government made a former Seventeenth Century *Pesthuis*, or Plague House,<sup>127</sup> available for this purpose. Soon the decision was made to build a new building across from the *Pesthuis* and connect the two with a walking bridge.<sup>128</sup> In 1998, the *Nationaal Natuurhistorisch Museum Naturalis* was built, pursuant to the design of architect Fons Verheijen.<sup>129</sup>

Fifteen years later, it became evident that the building could not cope with the increased number of visitors.<sup>130</sup> The decision was made to expand and restructure the building. On April 24, 2013, through a European bidding process, the project was eventually awarded to Neutelings Riedijk Architecten (NRA), even though the original architect Verheijen also participated.<sup>131</sup> NRA's design included building a new structure, which would function as the museum, and using the old building as a depot and research facility.<sup>132</sup> NRA's plan would no longer include the *Pesthuis* as part of the museum.<sup>133</sup> Additionally, NRA's plan also included the destruction of the walking bridge, as it would no longer serve any purpose, and the destruction of the Darwin House, an office building on the property of Naturalis.<sup>134</sup> After learning about NRA's plan, Verheijen objected to NRA's design on the grounds that it infringed his moral

124. Translation in English: National Museum for Natural History.

125. Rb. Den Haag 25 januari 2017, ECLI:NL:RBDHA:2017:555 (Verheijen/Stichting Naturalis Biodiversity Center) (Neth.), at 2.1.

126. *Id.*

127. *Pesthuis*, WIKIPEDIA, [https://nl.wikipedia.org/wiki/Pesthuis#cite\\_note-1](https://nl.wikipedia.org/wiki/Pesthuis#cite_note-1) (last visited Apr. 7, 2018) (Plague houses were created in the Sixteenth and Seventeenth centuries in the Netherlands to isolate people with the plague from the general population in Dutch cities).

128. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 2.1.

129. Monica Leenders, *Auteursrecht als middel om verbouwing te voorkomen*, IE-FORUM (May 15, 2017), <http://www.ie-forum.nl/artikelen/monica-leenders-auteursrecht-als-middel-om-verbouwing-te-voorkomen>.

130. *Id.*; see also Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 2.16.

131. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 2.17; see also Joost Poort, *Ceci n'est pas un Verheijen*, IE-FORUM (Apr. 7, 2017), <http://www.ie-forum.nl/artikelen/auteursrechtdebat-joost-poort-cesi-n-est-pas-un-verheijen>; Leenders, *supra* note 129.

132. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 2.19.

133. *Id.*; see also Leenders, *supra* note 129.

134. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 2.19.

rights as the original architect pursuant to Article 25(1)(c) and (d) of the Dutch Copyright Act.<sup>135</sup>

The case went to trial, and the lower court in the Hague decided in favor of Verheijen.<sup>136</sup> In January 2017, the court concluded in an interlocutory judgment that Naturalis with the proposed remodeling infringed Verheijen's *droit au respect*—his moral right to object to any modification or mutilation of his work.<sup>137</sup> The court reasoned that, as for the destruction of the Darwin House, Verheijen did not have a claim under Article 25, pursuant to the decision in *Jelles*, in which an architect cannot prevent the destruction of a building by relying on Article 25, nor can he prove that Naturalis had misused their authority in deciding on demolition.<sup>138</sup>

While the court did not find an infringement of moral rights regarding the new addition to the museum, it did find that the proposed remodeling of the museum, the modifications to the building itself, went to the core of the architect's design, qualifying it as a "distortion, mutilation, or any other form of deterioration of the work" under Article 15(1)(d) of the Dutch Copyright Act.<sup>139</sup> The court continued by stating that this "mutilation or deterioration" to the work negatively impacts the name and honor of the architect.<sup>140</sup> Verheijen had sufficiently proved such negative impact by arguing that the Naturalis building is the most important building in his oeuvre, because in a short period of time it had already received over three million visitors, and that it is the only building in which the Naturalis welcomes visitors, making it the embodiment of the museum.<sup>141</sup>

However, Verheijen, at the same time, reluctantly saw the remodeling of the museum proceed and claimed in a subsequent summary proceeding that his work was still being deteriorated.<sup>142</sup> On March 7, 2017, the court ordered Naturalis to immediately cease the remodeling and building procedures, awaiting the court's final ruling in the underlying proceeding.<sup>143</sup> Eventually, the parties settled on March 20, 2017, with Verheijen waiving his moral rights

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135. *Id.* at 2.18, 3.2.9; *see also* Leenders, *supra* note 129.

136. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 5; *see also* Leenders, *supra* note 129.

137. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 4.32; *see also* Leenders, *supra* note 129.

138. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 4.4-4.7.

139. *Id.* at 4.17-18.

140. *Id.* at 4.18.

141. *Id.* at 4.19.

142. *See* Rb. Den Haag 7 maart 2017, ECLI:NL:RBDHA:2017:2739 (Verheijen/Stichting Naturalis Biodiversity Center) (Neth.), at 3.2.

143. *Id.* at 4.19, 5.

after receiving 1.5 million EUR for an architecture foundation to be founded by Verheijen, litigation costs, attorney's fees, and a compensation to Verheijen himself.<sup>144</sup>

Although in the end, the architect in *Naturalis* chose to waive his moral rights, a case like this would likely never arise in the United States. While architectural works enjoy copyright protection,<sup>145</sup> architectural works do not fall within the limited scope of moral rights protection provided by VARA.<sup>146</sup> This means that as an architect in the United States, if the party you designed a building for wants to make modifications to your original design of the building, they are free to do so. Apart from the visual works of art that are provided moral rights protection, other copyrighted work is generally treated as part of a business deal. Once that deal has been concluded, the work is finished and you have no rights or say in what happens to the work. And that is exactly what the analogy to the *Naturalis* case reflects: in the United States, your rights end once the business deal concludes.<sup>147</sup>

### B. *Non-visual Arts – Musical Compositions*

Apart from architectural works being excluded from the scope of application of VARA, there are several other types of works that are excluded, such as musical compositions. Back in the 1990s, in the heyday of music genres such as Euro-house, moral rights protection in the Netherlands provided the widow of composer Carl Orff with the right to object to a house-version of part of her late husband's musical composition *Carmina Burana*.<sup>148</sup> In 1936, German composer Carl Orff composed *Carmina Burana*, of which *O Fortuna* is the first movement.<sup>149</sup> In 1982, Orff passed away.<sup>150</sup> Under German law, the moral rights passed to his widow, who subsequently transferred the rights to Schott, one of the plaintiffs, in addition to

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144. Leenders, *supra* note 129; see also *Naturalis*, *Schikking bereikt tussen Naturalis en Verheijen*, <https://www.naturalis.nl/nl/over-ons/nieuws/pers/persberichten/schikking-bereikt-tussen-naturalis-en-verheijen/> (last visited Feb. 11, 2018).

145. 17 U.S.C. § 102(a)(8) (2012) (granting copyright protection to architectural works).

146. *Id.* § 101 (While VARA provides a definition of “architectural work,” it does not include architectural works in its definition of “work of visual art,” therefore excluding it from moral rights protection).

147. Note that there is a difference between an architectural work and a work that is part of a building. See, e.g., *Cohen v. G & M Realty L.P.*, No. 13-CV-05612, 2018 WL 851374, at \*1 (E.D.N.Y. Feb. 12, 2018) (finding that the property owner's destruction by whitewashing the works of a group of graffiti street artists on buildings denied the artists the opportunity to remove their work and violated their rights under VARA).

148. See Rb. Amsterdam, 24 februari 1992, ECLI:NL:RBAMS:1992:AM2039 (Musikverlag B. Schott's Söhne/Indisc Nederland) (Neth.).

149. *Id.* at 1(a).

150. *Id.* at 1(b).

granting her the right to participate in the lawsuit on her behalf.<sup>151</sup> Stichting Stemra<sup>152</sup> held the reproduction rights to the works of Orff in the Netherlands.<sup>153</sup> Defendants in this case, Indisc Nederland BV and Red Bullet International BV, both marketed CDs in the Netherlands containing the song *O Fortuna*, respectively performed by Apotheosis and Fortuna.<sup>154</sup> One was a house version of Orff's *O Fortuna*, the other a disco/pop version, ranking third and first in the Dutch National Top 40.<sup>155</sup>

On February 14, 1992, Stemra notified the entire Dutch music industry, including Red Bullet and Indisc, that further production and distribution of unauthorized adaptations of the work *Carmina Burana*, *O Fortuna* by Orff were forbidden, as the right-holders to the original work never gave permission nor were willing to do so after the fact.<sup>156</sup> While Indisc refused to cease the sale of *O Fortuna* by Apotheosis, Red Bullet filed suit against Stemra, seeking to have Stemra nullify the notice that was issued to the Dutch music industry regarding Orff's work.<sup>157</sup> Stemra counter argued that Red Bullet marketed a modified and mutilated version of Orff's *O Fortuna* without Stemra's permission.<sup>158</sup> Schott joined, arguing Red Bullet violated Orff's moral rights.<sup>159</sup>

More specifically, in relation to moral rights, both argued that Red Bullet's version included a modification of Orff's composition, to which the court agreed.<sup>160</sup> After listening to Orff's original composition and Red Bullet's version, the court concluded that there were parts of Orff's composition left out, such as the introduction, but that several elements were added, such as a disco-rhythm and horse whinnying.<sup>161</sup> The court considered this to be a modification of Orff's work.<sup>162</sup> Taking into account the nature and extent of these modifications, it was reasonable of Schott to make a moral rights objection.<sup>163</sup>

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151. *Id.*

152. Now known as Bumra/Stemra, and is a Dutch organization for the interests of composers, poets, and music-publishers in the field of copyright. *See also* STICHTING BUMRA/STEMRA, <https://www.bumastemra.nl/> (last visited Apr. 7, 2018).

153. *See* Musikverlag B. Schott's Söhne/Indisc Nederland, 24 februari 1992, at 1(c).

154. *Id.* at 1(d)-(e).

155. *Id.*

156. *Id.* at 1(g).

157. *Id.* at 1(h), 3.

158. *Id.* at 6.

159. *Id.* at 8.

160. *Id.* at 12.

161. *Id.*

162. *Id.*

163. *Id.*

Denying Red Bullet's request, the court concluded that Stemra was justified in forbidding the further sale of the unauthorized modifications of *O Fortuna* by Orff, including the one by Red Bullet.<sup>164</sup> Regarding Indisc, the court found that Apotheosis's version of *O Fortuna* was not a parody, but rather a total, albeit altered copy of the work by Orff.<sup>165</sup>

The *O Fortuna* case is again an example of a case that would not arise in the United States in the context of moral rights protection. While United States law provides copyright protection for the infringement of copyright, a composer such as Carl Orff cannot after the sale of the copyrighted work prevent any modification or mutilation of his work. This again shows that the United States' moral rights protection is too narrow, and its arbitrary distinction even between the visual arts can have a severe impact on authors of works other than a painting or sculpture. Does United States copyright law really promote the advancement of the fine arts and sciences, as purported in the United States Constitution, when only a very select group of authors has the ability to prevent any modification or mutilation to their oeuvre?

## VI. RECOMMENDATIONS TO THE UNITED STATES COPYRIGHT OFFICE

As the examples above have shown, moral rights protection in the United States is very limited in scope. The scope of protection offered by VARA is too narrow and arbitrarily protects certain types of art, while DMCA's scope of protection, if any, remains uncertain. In the United States, copyright law was enacted to promote the advancement of the arts and sciences.<sup>166</sup> As such, one of the primary goals of copyright law is to protect the rights of *all* authors, provided that the work satisfies all requirements for protection.<sup>167</sup> Neither the United States Constitution nor the Copyright Act make a distinction between the *types* of work that are offered copyright protection.<sup>168</sup> In addition, neither state that such protection should be

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164. *Id.* at 15-16.

165. *Id.* at 20.

166. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

167. *See generally id.*; *see also* 17 U.S.C. § 102. Provided that the author's work is original, fixed in a tangible medium of expression, and consists of expressions rather than ideas, the author is granted automatic copyright protection. *See* 17 U.S.C. § 102.

168. *See generally* U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 102.

afforded to visual artists only, let alone a select group of visual artists.<sup>169</sup> Yet, when it comes to moral rights protection, an arbitrary distinction is made between copyrightable works.<sup>170</sup> After looking into the current scope of moral rights protection in the United States, moral rights protection in the Netherlands, and applying the laws to two factual scenarios, the United States Copyright Office should expand copyright protection.

First, the United States Copyright Office should lobby for the expansion of the moral rights of integrity and attribution to *all* copyrightable works. A first step would include broadening § 101's definition of "work of visual art" to include forms of visual art other than paintings, drawings, prints, and sculptures. Examples of visual arts that should be granted protection, and therefore included in the definition, are works of architecture, photography, illustrations, and motion pictures. By broadening the definition, the moral rights granted in § 106A will cover a wider variety of visual arts, not just the classic visual arts. This recommendation is further supported by the Coalition of Visual Artists (CVA),<sup>171</sup> who in their initial comments to the Copyright Office's request, advocate that the rights granted in § 106A should apply to all works of visual art, not just "fine art."<sup>172</sup> Specifically, the CVA found that VARA insufficiently protects commercial photography, illustrations, and other visual works.<sup>173</sup> The CVA also argues that original images produced by artists of commercial art – any art, design, illustration and photography created for advertising, publication, and other commercial purposes – are no different in artistic merit than the "fine art" protected by VARA, and in fact reach a much wider audience than most "fine art."<sup>174</sup> The Artists Rights Society (ARS) echoes this proposition, stating that the current class of works of visual art is too narrow and excludes a wide variety of art such as conceptual art, recorded performance art, digital art, large print editions, illustrations, and most photography.<sup>175</sup> The ARS concluded that moral rights protection would be significantly more effective if it would apply to *all* pictorial, graphical, and sculptural works.<sup>176</sup>

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169. *Id.*

170. *See generally* 17 U.S.C. § 106A ("[T]he author of a work of visual art").

171. The Coalition of Visual Artists encompasses various organizations, including: American Photographic Artists, the Graphic Artists Guild, the North American Nature Photography Association, and Professional Photographers of America. THE COALITION OF VISUAL ARTISTS, STUDY ON THE MORAL RIGHTS OF ATTRIBUTION AND INTEGRITY 26 (2017).

172. *Id.* at 13.

173. *Id.*

174. *Id.* at 3.

175. ARTISTS RIGHTS SOCIETY, COMMENTS OF ARTISTS RIGHTS SOCIETY (2017).

176. *Id.*

However, the expansion of moral rights protection should not stop there. Broadening the scope of VARA will still leave out other forms of copyrightable works of art, namely works of art that are not visual, such as musical compositions and literature. There does not seem to be any reasoning behind this hierarchy of art: "It's not clear to us why someone who is not the author of a work of visual art does not have [the right of attribution]."<sup>177</sup> While such types of works are offered protection through copyright infringement to a certain extent, a composer would not have any ability to seek protection for infringement once his rights are sold or assigned. The sale or assignment of copyrights is treated as a business deal and once the deal is concluded, you as the original creator of the work have no further say in what happens to it. But moral rights on the other hand, remain with the author of a copyrightable work, even after sale, unless the author expressly waives his rights.<sup>178</sup> That is exactly what makes moral rights protection valuable to artists. Therefore, a second recommendation would be to ensure moral rights protection is provided to authors of non-visual art as well. Every type of artist should be offered the equal opportunity to allege the infringement of his right of attribution or integrity, to protect his connection to the work and prevent any prejudice to his honor and reputation as an artist.

By expanding and clarifying the scope of protection of moral rights to the types of work covered, the uncertainty that currently exists under the DMCA will also be resolved. Since § 1202 of the DMCA makes it an offense to intentionally remove or alter the copyright management information of a work, including any mention of the author's name, it suggests that United States Copyright law recognizes a right of attribution outside the scope of VARA.<sup>179</sup> A simple clarification of works deserving of moral rights protection would resolve this uncertainty. Subsequently, a third recommendation would be for the DMCA to start actively recognizing the right of attribution for works covered under the DMCA. Additionally, it has become more common to remove copyright management information, often including the author's name, from digitized works.<sup>180</sup> The Coalition of Visual Artists argues that while § 1202 protection might work for digitized music and film, it seems to be

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177. KERNOCHAN CENTER FOR LAW, MEDIA AND THE ARTS, COLUMBIA LAW SCHOOL, COMMENTS OF THE KERNOCHAN CENTER FOR LAW, MEDIA AND THE ARTS, COLUMBIA LAW SCHOOL 6 (2017).

178. See 17 U.S.C. § 106A(e) (2012).

179. See *supra* Section III-B.

180. THE COALITION FOR VISUAL ARTISTS, *supra* note 171, at 13-14.



completely disregarded by search engines, internet pirates, or the general public.<sup>181</sup> The Coalition further argues that there are various additional ways attribution may be provided for a work; it can be visible or shown with the image, but it can also be included in the metadata or a digital watermark of the work.<sup>182</sup>

While moral rights protection in the United States should be extended to encompass all copyrightable works, but like in the Netherlands, this protection should *not* be perpetual. Perpetual moral rights protection, as in France, is not only burdensome, but also unfair by essentially allowing heirs of an author to make a claim under the right of attribution or integrity for eternity. Therefore, moral rights protection in the United States should only apply to works that are *not* in the public domain, effectively granting moral rights protection for the term of a copyright. This is also supported by the American Association of Law Libraries (AALL), who in its initial response to the Copyright Office's request, in the context of literary works, argued that moral rights protections should not apply to works in the public domain.<sup>183</sup> The AALL believes that a robust public domain will enable authors to create new works and that new moral rights protections would add additional requirements for authors who want to republish or make derivative works based on works in the public domain.<sup>184</sup> If different regimes of rights expire at different times, this would create tremendous confusion for potential authors, and potentially even discourage innovative compilations or derivative works from multiple public domain works because the requirement to attribute will be burdensome.<sup>185</sup> The AALL in its comments further refers to Ralph Oman, Register of Copyrights, who stated that "a federal statute enacted under the Copyright clause that purports to grant a moral right of integrity for certain works in perpetuity would be clearly unconstitutional."<sup>186</sup> Furthermore, in the context of trademarks, the United States Supreme Court held in *Dastar Corporation v. Twentieth Century Fox* that requiring attribution for a television program would lead to a perpetual patent and copyright, and accordingly deemed

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181. *Id.* at 14.

182. *Id.*

183. THE AMERICAN ASSOCIATION OF LAW LIBRARIES, STUDY ON THE MORAL RIGHTS OF ATTRIBUTION AND INTEGRITY 1 (2017). Cf. ARTISTS RIGHTS SOCIETY, *supra* note 175 (arguing that the protection offered by VARA should preferably be perpetual, if not at the very least co-terminus with the copyright term).

184. THE AMERICAN ASSOCIATION OF LAW LIBRARIES, *supra* note 183.

185. *Id.*

186. *Id.* (citing *Film Integrity Act of 1987: Hearing on H.R. 2400, Subcomm. On Courts, Civil Liberties, and the Admin. of Justice*, H. Comm. on the Judiciary, 90th CONG. 42-44 (1988)).

it unconstitutional.<sup>187</sup> Therefore, if moral rights were recognized in United States law in general, for the term of a copyright, many uncertainties accompanying existing United States law will be eliminated.

## VII. CONCLUSION

Thus, the current laws in the United States do not sufficiently protect the moral rights of authors. Both VARA and the DMCA are not effective in providing protections for authors, if any at all. The law is both too narrow and uncertain to provide full coherent protection. As such, it is recommended that the United States Copyright Office looks to the Netherlands as a reference and implements aspects of Dutch law by expanding the category of “works of visual art” under VARA, and by expanding moral rights protection to non-visual works of art in order to provide for a better recognition and protection of moral rights for *all* authors in the United States.

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187. *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 37 (2003); *see also* THE AMERICAN ASSOCIATION OF LAW LIBRARIES, *supra* note 183.

# Build the (Fire)Wall! Potential Dangers to Internet Freedom Under the Trump Administration

Maura K. Perri\*

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## I. INTRODUCTION

Perhaps the most paramount of all fundamental freedoms is the right to openly express oneself and engage in the exchange of ideas. Because the right to open public discourse is the catalyst for transmitting new viewpoints and changing the social order, the right to free speech has become a central tenet of American culture. To ensure that this crucial right was adequately protected, the framers crafted the First Amendment to the United States Constitution, which provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances.”<sup>1</sup> At the time James Madison drafted the First Amendment, he likely only intended to safeguard traditional means of exchange, such as print and oral communication. However, the creation of the internet, by generating new spaces for discourse, has consequently produced novel types of speech that also warrant protection from governmental regulation.

According to recent data, the number of American adults using the internet has steadily increased, rising from fifty-two percent in 2000 to eighty-eight percent in 2016.<sup>2</sup> Today, much of American internet communication takes place on online social media platforms, such as Facebook and Twitter. In fact, in the eyes of United States Supreme Court Justice Elena Kagan, “[e]verybody is on

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1. U.S. CONST. amend. I.

2. *Internet/Broadband Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

Twitter,” and most Americans under thirty-five years old use Facebook to learn about current events.<sup>3</sup> Not only are social media sites highly effective tools for sharing photos, planning events, and connecting with old friends, but these networks also allow any person with an internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.”<sup>4</sup> In fact, given the intense political polarization revolving around the most recent 2016 presidential election, many Americans have taken advantage of their online voices to spread political messages, engage in civic debate, and express concerns about the United States government. According to recent data, roughly one-third of American users of social media websites “indicate they often . . . or sometimes . . . comment, discuss or post about government and politics . . . .”<sup>5</sup> Obviously, the right to speak freely on the internet is not only important to communicate with friends and family about personal affairs, but as “the modern public square,”<sup>6</sup> it is also crucial to the state of American democracy.

Because the Supreme Court of the United States has fervently defended freedom of speech throughout U.S. history, and has even protected dialogue in cyberspace, most Americans have probably never considered how governmental censorship of internet activity could impact interpersonal communication and societal development. However, citizens of other nations deal with state control of the internet on a daily basis, primarily the citizens of the People’s Republic of China.<sup>7</sup> Since almost the beginning of web access in China, the Chinese government has been fearful of the people’s ability to instantly spread opposition to the Communist regime and potentially cause rebellion and political unrest.<sup>8</sup> Due to this concern, the Chinese government has utilized the building blocks of legal restriction, technological regulation, and scare tactics to construct an indestructible barrier between its citizens and certain information

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3. Ephrat Livni, *A US Supreme Court Discussion of Free Speech and Social Media Got Comically Postmodern*, QUARTZ (Mar. 3, 2017), <https://qz.com/922444/a-us-supreme-court-discussion-of-free-speech-and-social-media-got-comically-postmodern/>.

4. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

5. Maeve Duggan & Aaron Smith, *The Political Environment on Social Media*, PEW RES. CTR. (Oct. 25, 2016), <http://www.pewinternet.org/2016/10/25/political-content-on-social-media/>.

6. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

7. See *The Great Firewall of China*, BLOOMBERG NEWS, <https://www.bloomberg.com/quicktake/great-firewall-of-china> (last updated Nov. 5, 2018, 9:36 PM) (noting that at the advent of the Chinese internet, the Chinese government yielded the following sentiment: “When you open the window, the flies come in.”).

8. See *id.*

online.<sup>9</sup> This barrier, commonly known as the “Great Firewall of China,” has successfully thwarted Chinese internet users’ access to web content, impeded their ability to freely converse with the online global community, and totally eliminated a category of internet speech valued by most Americans: online political discourse.<sup>10</sup>

Although the inability to surf and post freely online is likely unimaginable to most Americans due to the First Amendment’s role as the backbone of American culture and government, the current American leader, President Donald Trump, has not only tried to prevent online criticism of his administration, but has also made statements and taken actions that suggest the potential for governmental control of internet activity similar to that of China.<sup>11</sup> In fact, one commentator noted, “[t]he view that the internet should be open, interoperable, and free from state censorship has been a pillar of American policy since the 1990s. Mr. Trump sharply departs from this establishment consensus.”<sup>12</sup>

Because open online discourse is tremendously important to both U.S. citizens and to the modern American political process, comments and actions from the American leader about suppressing internet freedoms should raise concerns about the potential demolition of free online expression and the construction of America’s own “Great Firewall.” In order to discuss whether there is a possibility that the open and predominantly uncensored American cyberspace could morph into a version similar to the heavily-monitored internet in China, this article will first discuss the current status of internet speech and governmental interference with online exchange in both the United States and China. Then, after juxtaposing the internet schemes in both nations, this article will explore President Trump’s recent attacks on internet speech and analyze their parallels with the Chinese government’s construction of the Great Firewall of China. Finally, this article will assess whether there are any viable avenues for the current administration to intrude upon one of the most highly cherished rights in modern times: the freedom of speech online.

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9. See Trina K. Kissel, Note, *License to Blog: Internet Regulation in the People’s Republic of China*, 17 IND. INT’L & COMP. L. REV. 229, 231-33 (2007).

10. See Jennifer Shyu, Comment, *Speak No Evil: Circumventing Chinese Censorship*, 45 SAN DIEGO L. REV. 211, 225, 227 (2008).

11. See, e.g., Sean Lawson, *The Law That Could Allow Trump To Shut Down The US Internet*, FORBES (Dec. 2, 2016, 7:00 AM), <https://www.forbes.com/sites/seanlawson/2016/12/02/the-law-that-could-allow-trump-to-shut-down-the-u-s-internet/#38e353f84dac>.

12. *Id.* (quoting Timothy Edgar, *Opinion: Donald Trump’s Troubling Internet*, CHRISTIAN SCI. MONITOR (Nov. 17, 2016), <https://www.csmonitor.com/World/Passcode/Passcode-Voices/2016/1117/Opinion-Donald-Trump-s-troubling-internet>).

## II. THE JOURNEY TO FREE INTERNET SPEECH IN THE UNITED STATES

Since its debut in the 1980s,<sup>13</sup> the internet has experienced extraordinary growth, reaching over three billion users worldwide in 2015.<sup>14</sup> In the United States, along with the internet's climbing popularity came struggle and debate over how to protect this vehicle for dialogue with "anyone, anywhere in the world, with access to the Internet" from governmental intrusion.<sup>15</sup> When dealing with this novel legal issue, the Supreme Court of the United States has, unsurprisingly, fervently defended internet expression while also retaining limitations conventionally imposed on more traditional methods of speech.<sup>16</sup> In fact, the Supreme Court has safeguarded even the most explicit materials, such as online pornography,<sup>17</sup> while only refusing to extend First Amendment protection on the rare occasion that the online content at issue has no societal value, such as when words invoke conflict or threat.<sup>18</sup>

### A. *Protection of Explicit Materials*

Although the earliest online speech cases dealt with an extremely taboo topic—internet pornography—the Supreme Court determined that the importance of maintaining the time-honored tradition of protecting free speech far outweighed any need to censor controversial adult content online.<sup>19</sup> Because the inception of the internet allowed users to disseminate information around the globe instantaneously for the first time, sexually explicit materials, such as pornographic images, quickly found their place in cyberspace.<sup>20</sup> In response, Congress enacted two provisions of the Communications Decency Act of 1996 (CDA) with the aim of shielding minors navigating the web in the United States from "indecent" and "patently offensive" communications online.<sup>21</sup> These two provisions

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13. Richard J. Zecchino, *Could the Framers Have Ever Imagined? A Discussion on the First Amendment and the Internet*, 1999 L. REV. MICH. ST. U. DET. C. L. 981, 985 (1999).

14. Jacob Davidson, *Here's How Many Internet Users There Are*, MONEY (May 26, 2015), <http://money.com/money/3896219/internet-users-worldwide/>.

15. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997).

16. *See, e.g.,* *Elonis v. United States*, 135 S. Ct. 2001, 2011-13 (2015) (recognizing that while sharing thoughts and ideas is generally protected online, true threats made via the internet are not protected by the First Amendment's guarantees).

17. *See, e.g.,* *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 673 (2004); *Reno*, 521 U.S. at 882.

18. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (holding that fighting words meant to incite a breach of peace are not protected by the First Amendment).

19. *See Reno*, 521 U.S. at 882.

20. *See id.* at 853-54.

21. *Id.* at 849; 47 U.S.C. § 223(a), (d) (1996).

criminalized both the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age" and the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age" on the internet.<sup>22</sup>

In the case of *Reno v. American Civil Liberties Union* decided in 1997, the Supreme Court of the United States had its first opportunity to grapple with the question of whether government regulation of internet expression violates the First Amendment when it was called to determine the constitutionality of the "indecent transmission" and "patently offensive display" provisions of the CDA.<sup>23</sup> In a unanimous decision, the Court concluded that the CDA provisions at issue were unconstitutional.<sup>24</sup> In its analysis, the Court first determined that Congress rendered the CDA provisions vague by failing to provide the differing meanings for "patently offensive" and "indecent" in each provision, and that ambiguous statutes comprehensively regulating certain content, such as the provisions at issue, create an "obvious chilling effect on free speech."<sup>25</sup>

Furthermore, in analyzing the constitutionality of the CDA provisions, the Court applied its most heightened level of review, strict scrutiny, which requires legislation to be narrowly tailored to serve a compelling government interest by the least restrictive means possible.<sup>26</sup> After utilizing this test, the Court determined that, although sheltering children from harmful materials is a legitimate and worthwhile government objective, the CDA provisions failed to pass heightened judicial scrutiny because they "lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech"<sup>27</sup> and because there were less restrictive means available to achieve the government's goal.<sup>28</sup> In other words, because these two CDA provisions were not narrowly tailored to achieve the goal of protecting minors, the provisions created a blanket restriction on all sexually explicit internet materials that would unnecessarily burden and suppress "a large amount of speech that adults have a constitutional right to receive and to address to one another."<sup>29</sup>

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22. *Reno*, 521 U.S. at 859-60; 47 U.S.C. § 223(a), (d) (1996).

23. *Reno*, 521 U.S. at 849.

24. *Id.* at 882.

25. *Id.* at 849, 871-72.

26. See *id.* at 871, 882; see also Stephen C. Jacques, Comment, *Reno v. ACLU: Insulating the Internet, The First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1981-82 (1997).

27. *Reno*, 521 U.S. at 874.

28. *Id.* at 879.

29. *Id.* at 874.



Although to some this decision may only seem like the Supreme Court's protection of the right to freely transmit sexual materials online, the Court's holding in *Reno* had important and far-reaching implications for all internet users and materials. For instance, this case of first impression led the Court to recognize that "content on the Internet is as diverse as human thought," and that creation of and access to this content, even if it is "indecent" or "patently offensive" to a portion of the population, is a right protected by the First Amendment.<sup>30</sup> Additionally, this decision marked the Court's first recognition of the internet as a communication medium warranting protection from governmental censorship and, in some cases, demanding the most stringent standard of judicial review.<sup>31</sup>

A few years after *Reno*, in the case of *Ashcroft v. American Civil Liberties Union*, the Court encountered a congressional enactment similar to the CDA, the Child Online Protection Act (COPA), and had yet another opportunity to apply heightened scrutiny to internet regulations and renew its commitment to staunchly safeguarding internet expression.<sup>32</sup> In response to the Court's decision in *Reno*, Congress made its second attempt to make the internet safe for minors by enacting COPA, which imposed penalties of a \$50,000 fine and six months' imprisonment for knowingly posting content that is "harmful to minors" on the internet for "commercial purposes."<sup>33</sup> In determining whether the United States Court of Appeals for the Third Circuit correctly enjoined the enforcement of COPA, the Supreme Court applied strict scrutiny review and determined that, because the legislation would suppress constitutionally-protected internet speech, the Government had the burden of showing that "the challenged regulation is the least restrictive means among available, effective alternatives."<sup>34</sup> The Government, however, was unable to prove that imposing criminal punishments for posting harmful content was the least restrictive means available to shield minors from explicit materials online.<sup>35</sup> In fact, the Supreme Court observed that blocking and filtering software could provide a more effective means of reaching the government's desired end.<sup>36</sup>

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30. *Id.* at 849, 852 (quoting *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

31. See Jacques, *supra* note 26, at 1986-88.

32. See *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 659-60 (2004).

33. *Id.* at 661; 47 U.S.C. § 231(a) (1998).

34. *Ashcroft*, 542 U.S. at 666.

35. *Id.*

36. *Id.* at 666-67.

Ultimately, although many people generally consider childhood exposure to explicit materials online inappropriate and potentially harmful, the Supreme Court is not willing to allow Congress to create suppressive barriers between internet-using adults and content that those adults have a constitutional right to receive and disperse. Obviously, in these early online speech decisions dealing with pornography, the Supreme Court conveyed the important message that protecting online content is a necessity rooted in American tradition, even if some consider the content improper or unimportant.

### *B. Protection of Sex Offenders' Access to Social Media*

In addition to statutes aimed at protecting children from sexually explicit materials online, states have introduced legislation regulating sex offenders' access to social media websites with the goal of shielding minors from potential sexual abuse.<sup>37</sup> Following its precedent recognizing the importance of online communication, the Supreme Court once again concluded that the importance of online communication greatly outweighed any potential government interest.<sup>38</sup>

In *Packingham v. North Carolina*, the Supreme Court was petitioned to determine the constitutionality of a North Carolina "statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter."<sup>39</sup> Ultimately, the Court declared North Carolina's statute unconstitutional because foreclosing "access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."<sup>40</sup> In its analysis, the Court recognized the importance of access to and the value of social media in modern society by noting, "North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."<sup>41</sup> The Supreme Court, in deciding that North Carolina's legislation was invalid under the First Amendment, not only acknowledged every U.S. citizen's right to access and openly post on social media websites, but also once again defended internet freedoms.<sup>42</sup>

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37. See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733 (2017).

38. See *id.* at 1737.

39. *Id.* at 1733.

40. *Id.* at 1737.

41. *Id.*

42. See *id.*

### C. *The Few Limitations on Online Speech*

While the Supreme Court of the United States has vehemently championed the right to liberally communicate online, U.S. citizens cannot escape the fact that “[c]ertain speech may be limited by the government, regardless of the type of forum.”<sup>43</sup> For example, the Supreme Court has held that the government may regulate words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace,”<sup>44</sup> also known as fighting words, when the government is attempting to avoid a breach of peace and where its regulations have been narrowly tailored.<sup>45</sup> In deciding that the limitation on fighting words poses no Constitutional problem, the Court noted that such expressions “are no essential part of any exposition of ideas.”<sup>46</sup> Because fighting words serve no valuable purpose for society, the Court would also permit their regulation on the internet.

Furthermore, when specifically dealing with issues revolving around the World Wide Web, the Supreme Court has also approved certain online speech restrictions that had previously only been applied to traditional methods of speech. In *Reno*, although the Court primarily found that the First Amendment prohibited unnecessarily burdensome restrictions on sexually explicit materials on the internet, the Court did acknowledge that the free speech rights of adult netizens<sup>47</sup> can be limited and explained that “sexual expression which is indecent but not obscene is protected by the First Amendment.”<sup>48</sup> Before holding that obscene material on the internet can be governmentally barred, the Court previously prevented obscene expression from being shielded under the First Amendment’s protective umbrella in a case dealing with the mailing of lewd materials.<sup>49</sup> Although the Court has expressly barred obscene speech, which has generally been defined as expression that appeals to the prurient interest in sex, is patently offensive according to contemporary community standards, and lacks social value,<sup>50</sup> it

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43. Shikha Parikh, *Your Right to Speak on Government Sponsored Social Media Sites*, 50 MD. B. J. 14, 18 (2017).

44. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

45. Parikh, *supra* note 43.

46. *Chaplinsky*, 315 U.S. at 572.

47. *Netizen*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/netizen> (last visited Mar. 30, 2018) (“Netizen” is a term meaning “an active participant in the online community of the Internet.”).

48. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (quoting *Sable Commc’ns of Cal., Inc. v. Fed. Commc’ns. Comm’n*, 492 U.S. 115, 126 (1989)).

49. *Roth v. United States*, 354 U.S. 476, 493 (1957).

50. See *Miller v. California*, 413 U.S. 15, 18, 20-21 (1973).

seems that the Court has painted its restrictions on obscenity with an extremely broad brush, given that it has protected, on multiple occasions, sexually explicit materials online.<sup>51</sup>

Additionally, although true threats, or statements meant to “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,”<sup>52</sup> were previously disqualified for constitutional protections only when dispersed through more traditional methods of speech,<sup>53</sup> the Supreme Court reiterated this sentiment for true threats on the internet.<sup>54</sup> However, the Supreme Court did create a caveat to the prohibition of threatening language when deciding whether graphically violent rap lyrics posted online fit the definition of a true threat as opposed to an artistic expression.<sup>55</sup> In determining that the at-issue rap lyrics did not qualify as true threats, the Court noted that the speaker must have “knowledge that the communication will be viewed as a threat.”<sup>56</sup> Accordingly, although internet speech is generally protected in the United States, traditional limitations on free speech have been applied to the internet by the Supreme Court that allow governmental restrictions on certain types of “nonspeech.”<sup>57</sup>

### III. THE GREAT FIREWALL: ONLINE SPEECH REGULATION IN THE PEOPLE’S REPUBLIC OF CHINA

As the Cultural Revolution<sup>58</sup> came to an end after the death of Communist leader Mao Zedong, China began to slowly unlock its doors and open itself up to the outside world.<sup>59</sup> As a part of its effort

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51. See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004); *Reno*, 521 U.S. at 872; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (holding that two provisions of the Child Pornography Act of 1996 were unconstitutional because the provisions’ vague language allowed for the prohibition of materials that were neither obscenely nor illegally depicting children in a sexually exploitative manner).

52. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

53. See *Watts v. United States*, 394 U.S. 705, 708 (1969).

54. *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

55. See *id.* at 2017.

56. *Id.* at 2012.

57. Parikh, *supra* note 43.

58. Thomas Phillips, *The Cultural Revolution: All You Need to Know About China’s Political Convulsion*, GUARDIAN (May 10, 2016), <https://www.theguardian.com/world/2016/may/11/the-cultural-revolution-50-years-on-all-you-need-to-know-about-chinas-political-convulsion> (The Cultural Revolution was a sociopolitical movement in China headed by Mao Zedong that took place in the 1960s and isolated China from the outside world. Although this movement ultimately failed, the goal of the campaign was to rid China of its past, defeat capitalism’s presence in China, and ensure a socialist society.).

59. Yutian Ling, *Upholding Free Speech and Privacy Online: A Legal-Based and Market-Based Approach for Internet Companies in China*, 27 SANTA CLARA COMPUTER & HIGH TECH. L.J. 175, 176 (2011).

to move away from an isolationist past, China established its first international internet connection in 1994.<sup>60</sup> Although access to the global internet in China seemed like a liberating opportunity for China's citizens to communicate with the world beyond its borders, the Chinese government, realizing the World Wide Web's capability to instantaneously circulate ideas and information, sought to control its potential for spreading political unrest amongst its population.<sup>61</sup>

According to recent data, internet use in China is at an all-time high, with 731 million Chinese citizens logging on in 2017.<sup>62</sup> This extremely high rate of online activity in the People's Republic of China (PRC),<sup>63</sup> however, is sharply juxtaposed with China's extremely stringent regulation of the internet, which leaves its over half a billion internet-using citizens with little room to freely connect with others in cyberspace.<sup>64</sup> In fact, in recent times, "China has emerged as the main offender in Internet censorship" using what is dubbed its "Great Firewall of China" to block any "unhappy information" and enforcing severe penalties for internet users who violate censorship laws.<sup>65</sup>

A. *Legal Restriction, Technological Regulation, and Scare Tactics: The Building Blocks of China's Great Firewall*

Similar to that of the United States, the Constitution of the People's Republic of China provides that "Citizens . . . enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."<sup>66</sup> However, despite its promise to allow the Chinese population to communicate freely, the Chinese government began taking steps to silence internet dissenters against the Communist Party of China (CPC), prevent excessive outside influence,

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60. *Id.*

61. See Simon Denyer, *China's Scary Lesson to the World: Censoring the Internet Works*, WASH. POST (May 23, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/chinas-scary-lesson-to-the-world-censoring-the-internet-works/2016/05/23/413afe78-fff3-11e5-8bb1-f124a43f84dc\\_story.html?utmterm=.a45937212e0d](https://www.washingtonpost.com/world/asia_pacific/chinas-scary-lesson-to-the-world-censoring-the-internet-works/2016/05/23/413afe78-fff3-11e5-8bb1-f124a43f84dc_story.html?utmterm=.a45937212e0d).

62. Steven Millward, *China Now Has 731 Million Internet Users, 95% Access from Their Phones*, TECH IN ASIA (Jan. 22, 2017), <https://www.techinasia.com/china-731-million-internet-users-end-2016>.

63. See *id.*

64. See Denyer, *supra* note 61.

65. Shyu, *supra* note 10, at 225, 227.

66. *Constitution of The People's Republic of China, 1982*, U. S. CAL. US-CHINA INST., <http://china.usc.edu/constitution-peoples-republic-china-1982#chap3> (last visited Nov. 2, 2017).

and generally control online content almost immediately after it entered the global network by building the Great Firewall of China.<sup>67</sup>

In 1996, only two short years after establishing its international internet connection, China's State Council laid the foundation for the Great Firewall by promulgating the "Interim Provisions Governing the Management of Computer Information Networks" (1996 Provisions).<sup>68</sup> In these provisions, the Chinese government regulated the liberal exchange of online materials by criminalizing the disclosure of state secrets, prohibiting the transmission of sexually suggestive material, and forbidding the dissemination of information that could harm the government or social stability.<sup>69</sup> However, these provisions, along with many other similar regulations, catalogue what qualifies as forbidden material in a manner that is "so vague as to encompass potentially anything,"<sup>70</sup> leaving Chinese internet users somewhat uncertain about what they can and cannot share online.

Chinese leaders have also relied heavily on the assistance of party and governmental agencies, whose regulation of the internet is crucial to the restriction of China's cyberspace and the impenetrability of China's Great Firewall. Essentially, these "agencies control both who is able to post content on the Internet . . . and what content is posted,"<sup>71</sup> and include the Ministry of Public Security, which filters and monitors the internet, the General Administration of Press and Publication, which "has the legal authority to screen, censor, and ban any . . . Internet publication in China," and other organizations.<sup>72</sup> Perhaps most shockingly, the Ministry of Information Industry (MII) "controls the licensing and registration of all 'Internet information services' (sometimes translated as 'Internet content providers'), which are defined to include anyone providing information to the public via the Internet."<sup>73</sup> In effect, the MII is "pre-approving who gets to speak and who does not"<sup>74</sup> and is ultimately quelling free speech and exchange on the World Wide Web. For instance, in exercising its powers, the MII, along with the help

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67. See Kissel, *supra* note 9, at 230 (noting that the Chinese government created many regulations during the first decade of the Internet's existence in China to maintain "ideological unanimity" and enforce "[s]tate control of all information flows" on the World Wide Web).

68. *Id.* at 234.

69. *Id.*

70. Ling, *supra* note 59, at 183.

71. *Id.* at 181.

72. *Agencies Responsible for Censorship in China*, CONG.-EXECUTIVE COMMISSION ON CHINA, <https://www.cecc.gov/agencies-responsible-for-censorship-in-china> (last visited Nov. 2, 2017).

73. *Id.*

74. Ling, *supra* note 59, at 182.

of the Chinese State Council, has effectively restricted the online administration of “[n]ews,” which it broadly defines as anything relating to politics, military or foreign affairs, economics, social events, and social or public affairs.<sup>75</sup> Essentially, by promulgating the Administration of News regulations, the MII has successfully restricted anything that could be classified as “news” and has limited what information Chinese citizens receive about current affairs to solely what is approved and disseminated by the Chinese government and its cooperating agencies.<sup>76</sup> As an example of the Administration of News regulations’ impact on online news dissemination, if Chinese internet users were to attempt to find information about the well-known Tiananmen Square Massacre that took place in Beijing in 1989, their efforts would be practically fruitless.<sup>77</sup> In fact, because the Chinese government continuously censors online news, it has been able to prevent people from talking about this subject online and preclude many youths from knowing the event took place at all.<sup>78</sup>

Additionally, in order to gain even greater control over internet content, the CPC began to regulate the technology that provides the PRC with access to the internet. For example, in 2000, the CPC promulgated the Measures for Managing Internet Information Services (2000 Measures), which required internet service providers (ISPs) “to record the dates and times when subscribers accessed the Internet, the subscriber’s account number, the addresses of all websites visited, and the telephone number used to access the Internet.”<sup>79</sup> By requiring the companies that provide internet access to document the activity of internet users, the 2000 Measures not only impose liability on ISPs and internet content providers, but also incite fear in internet users who want to avoid criminal and monetary penalties, possibly preventing them from speaking and searching freely online.<sup>80</sup> Furthermore, the 2000 Measures expanded on the four restrictions set forth in the aforementioned 1996 Provisions by also disallowing an additional five broad categories of information on the internet, including anything that “undermines national unity.”<sup>81</sup> Once again, these vague restrictions blur the lines of what

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75. Kissel, *supra* note 9, at 238-39.

76. *See id.* at 237-40.

77. *See id.* at 246.

78. *See* Christopher Beam, “*I Think It’s Already Been Forgotten*”: How China’s Millennials Talk About Tiananmen Square, NEW REPUBLIC (June 3, 2014), <https://newrepublic.com/article/117983/tiananmen-square-massacre-how-chinas-millennials-discuss-it-now>.

79. Kissel, *supra* note 9, at 235.

80. *See id.* at 231, 240.

81. *Id.* at 235.

is and is not permissible on the web and further stifle Chinese netizens' online posts.

More recently, in late August 2017, the Cyberspace Administration of China, another government agency controlling the internet in China, administered new rules targeting online commenters.<sup>82</sup> These rules have stripped Chinese netizens of any semblance of online anonymity, requiring "internet forum providers . . . to force their users to register using their real names," which must also be verified.<sup>83</sup> By preventing online users from hiding their identity behind a username, the CPC has stifled online speech by making it easier for the government to discover who is behind certain online comments and posts.

Despite all of these building blocks that make up the Great Firewall, both Chinese citizens and travelers are able to circumvent the internet barrier through the use of virtual private networks, more commonly referred to as "VPNs."<sup>84</sup> Essentially, "[a] VPN works by 'tunneling' your internet traffic onto a private network before sending it out onto the public internet," making it seem like the internet user is accessing the internet from Los Angeles or London instead of mainland China and allowing that individual to access information and websites typically blocked and post about topics disallowed on the PRC's internet.<sup>85</sup> Although VPNs have been used in China for many years, the CPC began its crackdown on this technological hole in the Great Firewall and has ordered the three top ISPs in China to completely bar the use of VPNs on their networks by February 2018.<sup>86</sup> This latest technological directive issued by the government will prevent netizens in China from accessing information unfavorable to the CPC, but it will also further prevent them from engaging in dialogue with members of the international internet community.

By employing agencies to filter internet content and information, having nearly complete control of providers of internet access, and creating criminal and monetary penalties for violating extremely ambiguous regulation, both China's government and its major political party have continued to build an increasingly stronger and

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82. David Meyer, *China Tightens the Noose on Free Online Speech, Again*, FORTUNE (Aug. 28, 2017), <http://fortune.com/2017/08/28/china-real-names-online-anonymity-censorship/>.

83. *Id.*

84. See Echo Huang, *What You Need to Know About China's VPN Crackdown*, QUARTZ (July 12, 2017), <https://qz.com/1026064/what-you-need-to-know-about-chinas-vpn-crackdown/>.

85. *See id.*

86. *Id.*



impressive, multi-layered system of blocking and controlling internet content to prevent “information harmful to the Communist Party from entering the country.”<sup>87</sup> Additionally, because China’s government has successfully crafted the “largest internet censorship regime in the world,” it has also achieved the aim of stifling speech and exchange.<sup>88</sup> Simply put, because “[b]road, vague, and conflicting legislation hangs over Chinese citizens like a fog, obscuring the boundaries of free speech . . . most people are too wary to approach them for fear of over stepping them.”<sup>89</sup> Despite the assurances of free speech rights in China’s Constitution, Chinese citizens and foreign visitors logging on to the World Wide Web in the PRC are legally and technologically prevented from accessing certain content and may be intimidated by the harsh consequences threatened for violating China’s confusing and severe restrictions on the internet.

#### IV. PRESENT DIFFERENCES IN INTERNET EXPRESSION IN THE UNITED STATES AND CHINA: IS AN INTERNET REGIME SIMILAR TO THAT OF CHINA POSSIBLE IN THE UNITED STATES?

Although both the United States and China have similar language regarding freedom of speech in their respective Constitutions, these countries’ methods of internet speech regulation are currently enormously different. “The critical difference between the Chinese model and the United States model is this: the Chinese legal basis for controlling the Internet is vague and general, while the United States’ is specific and narrow.”<sup>90</sup> In the United States, while there are numerous limits on free speech, the Supreme Court, acting as the interpreter and protector of the United States Constitution, has only allowed the federal government or state governments to proscribe speech in the direst of circumstances, such as when a child is sexually exploited, or when there is a legitimate threat posed to others.<sup>91</sup> In the name of the First Amendment, the Supreme Court has generally rejected any law that would have a chilling effect on the sharing of ideas, artistic expression, and other

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87. Denyer, *supra* note 61.

88. Benjamin Haas, *China Moves to Block Internet VPNs From 2018*, GUARDIAN (July 11, 2017, 12:33 AM), <https://www.theguardian.com/world/2017/jul/11/china-moves-to-block-internet-vpns-from-2018>.

89. *Prior Restraints*, CONG.-EXECUTIVE COMMISSION ON CHINA, <https://www.cecc.gov/prior-restraints> (last visited Jan. 4, 2018).

90. Jeffrey (Chien-Fei) Li, *Internet Control or Internet Censorship? Comparing the Models of China, Singapore, and the United States to Guide Taiwan’s Choice*, 14 U. PITT. J. TECH. L. & POL’Y 1, 24 (2013).

91. See *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015).

types of valuable discourse, even if they may be considered taboo, hateful, downright worthless to certain members of the population, or even critical of the U.S. government.<sup>92</sup>

In China, on the other hand, while the Chinese Constitution boasts freedom of speech for all Chinese citizens, the government and the major political party have utilized legislative restriction and technological control to build a tremendous internet barrier, enclosing Chinese citizens in their own online bubble free from political chat and other types of discourse with one another and the outside world. Perhaps most importantly in the modern world, unlike the Supreme Court of the United States in *Packingham v. North Carolina*, China's leaders saw no value in the use of popular worldwide social media engines like Facebook, Twitter, and Instagram, viewing these sites as a threat to Chinese national unity, effectively blocking them, and creating Chinese copycats of these sites, such as RenRen and Sina Weibo.<sup>93</sup>

As it stands currently, it seems that the most recognizable difference between American and Chinese regulation of internet speech lies in the motives of the two countries when limiting the sharing of online content. In the United States, when the legislative or executive branches of government attempt to suppress online communication, the judiciary intervenes to protect the highly-revered First Amendment and only allows limitation on speech when absolutely necessary.<sup>94</sup> In contrast, in the PRC, the government, with the help of agencies and other party officials, has not only taken legal control of the internet, but has also dominated the technological existence of cyberspace for the goal of preventing resistance against the CPC and to achieve cyber sovereignty.

## V. PRESIDENT TRUMP'S RECENT ATTACKS ON INTERNET SPEECH: WILL THE CURRENT ADMINISTRATION CREATE THE GREAT FIREWALL OF AMERICA?

The forty-fifth President of the United States, Donald Trump, is an extremely avid user of online social media sources and is well-

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92. See, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872 (1997).

93. See Eric Savitz, *5 Things You Need To Know About Chinese Social Media*, FORBES (Oct. 25, 2012, 2:02 PM), <https://www.forbes.com/sites/ciocentral/2012/10/25/5-things-you-need-to-know-about-chinese-social-media/#4e95d5b019f0> (RenRen is said to be equivalent to Facebook, while Weibo is often compared to Twitter).

94. See, e.g., *Reno*, 521 U.S. at 870.

known for his presence on Twitter.<sup>95</sup> In fact, President Trump credited the existence of social media for his victory in the 2016 presidential election.<sup>96</sup> Despite his reliance on the internet as a platform to inform the American populace about current events, President Donald Trump has, on multiple occasions, condemned internet speech and suggested that the government gain more control over internet activity in the United States, which could lead to a cyberspace similar to that of the PRC. Given President Trump's statements, is it possible that the Trump administration could execute his plan to "close that internet up"<sup>97</sup> and sustain a China-like internet regime in the United States? Additionally, would this internet censorship even be possible, considering the First Amendment's stronghold in American culture and the Supreme Court's fervent protection of online speech?

The following sections of this article will explore President Trump's attempts to stifle online internet speech through methods that mirror the building blocks used by the Chinese government in its construction of the Great Firewall: scare tactics and technological regulation. It will also discuss how the Trump administration, much like the CPC, has sought to prevent online criticism of the U.S. government, specifically on Twitter. After discussing President Trump's previous actions, this article will discuss whether Trump's former efforts or the invocation of a looming legal measure could potentially lead to the end of a free and open American internet. Ultimately, the following sections will consider Trump's past actions and possible future conduct to determine whether the construction of a "Great Firewall" of America is a possibility.

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95. See Donald J. Trump (@realDonaldTrump), TWITTER, [https://twitter.com/realDonaldTrump?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) (last visited Feb. 14, 2018); see also Nolan D. McCaskill, *Trump Credits Social Media for his Election*, POLITICO (Oct. 20, 2017, 7:05 PM), <https://www.politico.com/story/2017/10/20/trump-social-media-election-244009>.

96. McCaskill, *supra* note 95; see also generally *Read the Social Media Posts Russians Allegedly Used to Influence 2016 Election Cycle*, CBS NEWS (Feb. 16, 2018, 7:47 PM), <https://www.cbsnews.com/news/read-social-media-posts-russians-allegedly-used-to-influence-the-election/>. In addition to President Trump's active online presence, there are also allegations that Russia contributed to President Trump's victory by manipulating America social media and launching online campaigns "supporting the presidential campaign of then-candidate Donald J. Trump and disparaging Hillary Clinton." *Id.*

97. Lawson, *supra* note 11.

## A. *President Trump's Various Attempts to Stifle Online Speech*

### 1. *Using Scare Tactics to Start the Censorship Conversation*

Soon after Donald Trump hit the campaign trail during the 2016 presidential election, he began to condemn the open nature of the World Wide Web, utilizing terrorist groups' exploitation of online communication to begin discussing the need for internet restriction.<sup>98</sup> First, in December 2015 at a campaign rally in South Carolina, Trump spoke to potential voters about ISIS's<sup>99</sup> use of online forums to recruit members to its terrorist organization and suggested "closing that Internet up in some way."<sup>100</sup> Trump went on to add, "Somebody will say, 'Oh, freedom of speech, freedom of speech.' These are foolish people."<sup>101</sup> Although Trump's goals for internet censorship at the time he made these comments seemed to be aimed at preventing the advancement of terrorism and protecting U.S. citizens, an aim attractive to many Americans, these negative comments about freedom of speech in cyberspace were unprecedented, considering that "no other presidential candidate or intelligence official has advocated for 'closing' the Internet . . . ."<sup>102</sup>

Additionally, after winning the election, President Trump continued to criticize the expansiveness of the internet by, once again, commenting on the link between recruitment in terrorist organizations and the World Wide Web.<sup>103</sup> On September 15, 2017 after an act of terrorism in London, President Trump used his Twitter account to broadcast to millions of followers that "[l]oser terrorists must be dealt with in a much tougher manner. The internet is their main recruitment tool which we must cut off & use better!"<sup>104</sup> In response to this post, many Twitter users showed concern about interference with internet freedom, with one person replying, "Cut the internet"? The insulation is dangerous"<sup>105</sup> and another commenting, "You want to cut off the internet?! The Great Firewall of

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98. See Keith Wagstaff, *Donald Trump Calls For 'Closing that Internet Up'*, NBC NEWS (Dec. 8, 2015, 10:53 AM), <https://www.nbcnews.com/tech/internet/donald-trump-calls-closing-internet-n476156>.

99. Isis is a "powerful terrorist militant group that has seized control of large areas of the Middle East." *ISIS, HISTORY*, <https://www.history.com/topics/isis> (last updated Aug. 21, 2018).

100. Wagstaff, *supra* note 98.

101. *Id.*

102. *Id.*

103. See Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 15, 2017, 3:48 AM), <https://twitter.com/realdonaldtrump/status/908643633901039617>.

104. *Id.*

105. Andreas Augenthaler (@DFBbear), TWITTER (Sept. 18, 2017, 9:18 AM), <https://twitter.com/DFBbear/status/909813887352090624>.

the US?”<sup>106</sup> Indeed, President Trump’s comments even alarmed and garnered opposition from experts in cybersecurity, such as Timothy Edgar, Director of Law and Policy at Brown University’s Executive Master in Cybersecurity program.<sup>107</sup> According to Edgar, “we need to take seriously Trump’s statements and what they might portend for the future of internet security and privacy.”<sup>108</sup> Although President Trump’s commentary about the internet may seem like frustrated reactions to the use of online communication tools to further terrorist objectives, these comments also present a cause for concern for many American netizens accustomed to a culture that encourages free internet speech.

## 2. *Defeating Net Neutrality*

Within days of his inauguration, Trump began his mission to end net neutrality in the United States, which was originally created to “safeguard free expression online” and preserve the ability to speak freely on an open internet.<sup>109</sup> Essentially, the net neutrality rules created under the Obama administration prevented providers of internet services from blocking content, changing internet speeds for certain websites, or doing anything else that would inhibit the use of the internet.<sup>110</sup>

In his first official move to abolish net neutrality rules, President Trump appointed Ajit Pai, “a critic of net neutrality . . . to chairman of the Federal Communications Commission, the agency responsible for enforcing those regulations,” on January 23, 2017.<sup>111</sup> Later, in the spring of 2017, President Trump furthered his desire to end net neutrality by signing a bill “releasing internet service providers . . . from having to protect consumer data, in effect jeopardizing people’s privacy and opening them up to surveillance.”<sup>112</sup> Finally, on

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106. Cathy Flusche (@cathy\_flusche), TWITTER (Sept. 15, 2017, 9:04 AM), [https://twitter.com/cathy\\_flusche/status/909810346906570752](https://twitter.com/cathy_flusche/status/909810346906570752).

107. See Lawson, *supra* note 11.

108. *Id.*

109. Steve Lohr, *Net Neutrality Is Trump’s Next Target, Administration Says*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/technology/net-neutrality.html> (Net neutrality was established to “preserve the open internet and ensure that it could not be divided into pay-to-play fast lanes for web and media companies that can afford it and slow lanes for everyone else.”).

110. *See id.*

111. Tim Stelloh, *Trump Promotes Neutrality Opponent Ajit Pai to Lead FCC*, NBC NEWS (Jan. 23, 2017, 8:40 PM), <https://www.nbcnews.com/tech/internet/trump-promotes-neutrality-opponent-ajit-pai-lead-fcc-n711116>.

112. Roni Jacobson, *Internet Censorship is Advancing Under Trump*, WIRED (Apr. 12, 2017, 12:00 AM), <https://www.wired.com/2017/04/internet-censorship-is-advancing-under-trump/>; see also S.J. Res. 34, 115th Cong. (2017) (enacted).

December 14, 2017, President Trump's promotion of Ajit Pai resulted in the achievement of his goal to end net neutrality in the United States when the Federal Communications Commission announced its decision to dismantle the net neutrality rules, "a step critics warn will upend the internet by allowing cable companies to control where their customers can go online" and to block certain content.<sup>113</sup> This sequence of events, by rapidly demolishing the rules that maintain Americans' ability to generally enjoy the uninhibited and open nature of the American internet platform, could give internet service providers more leeway in regulating information and, in turn, affect Americans' daily internet use.

### 3. *Silencing Twitter Dissenters*

In addition to speaking openly about closing the internet and being at the forefront of net neutrality's demise, President Trump and his administration have also attacked free speech online by both attempting to uncover the identity of certain Twitter dissenters and blocking Trump's critics. In April 2017, around the same time President Trump signed the bill releasing ISPs from protecting internet user data, Twitter sued the United States Department of Homeland Security after it demanded Twitter reveal the identities of those behind an anti-Trump account.<sup>114</sup> The account, @ALT\_USCIS, which is run by ex-government employees dissatisfied with the Trump administration, "broke no laws and only used Twitter to voice dissent."<sup>115</sup> Not long after the suit was filed, news sources published stories on the case, and the government quickly revoked its request to learn the names of the oppositional Twitter users.<sup>116</sup>

Only a few months later, President Trump and members of his administration with access to his social media accounts, once again, attempted to silence online dissent by blocking those openly challenging his politics on Twitter.<sup>117</sup> In response, seven Twitter

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113. Margaret Harding McGill, *FCC Votes to Repeal Net Neutrality Rules*, POLITICO (Dec. 14, 2017, 1:16 PM), <https://www.politico.com/story/2017/12/14/fcc-votes-to-repeal-net-neutrality-rules-295500>; see also *FCC Acts to Restore Internet Freedom*, 2017 WL 6405704, at \*1 (Dec. 14, 2017) (announcing the FCC's decision to reverse the "FCC's 2015 heavy-handed utility-style regulation of broadband Internet access service, which imposed substantial costs on the entire Internet ecosystem.").

114. Jacobson, *supra* note 112.

115. *Id.*

116. *Id.*

117. See Complaint for Declaratory and Injunctive Relief at 1, Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205), 2017 WL 2952634, at \*1.

users and the Knight First Amendment Institute at Columbia University filed a complaint for declaratory and injunctive relief in the United States District Court for the Southern District of New York against President Trump, White House Press Secretary Sean Spicer, and White House Director of Social Media Daniel Scavino.<sup>118</sup> According to the complaint, President Trump's effort to quell any opposition by blocking the Plaintiffs on Twitter "violates the First Amendment because it imposes a viewpoint-based restriction on the Individual Plaintiffs' participation in a public forum," "access to official statements the President otherwise makes available to the general public," and their "ability to petition the government for redress of grievances."<sup>119</sup>

Although President Trump's previous commentary and attacks on net neutrality amounted to indirect and circuitous maneuvers to begin shutting the door on an unrestrained cyberspace, the Trump administration's actions toward Twitter users marked a direct strike on the ability of the American public to disagree with the President's political ideology on social media platforms. This sort of targeted vendetta against unfavorable political speech notably parallels the actions taken by the Chinese government on its path to create a barrier between its people and online opposition. Because President Trump is taking steps to eliminate online dissent that mimic the premier internet censor's journey to the Great Firewall of China, his actions on Twitter should raise red flags about potential First Amendment implications, especially in a nation that so readily sanctifies open exchange and political expression.

*B. Will President Trump's Actions Against the Internet and its Users Lead to an Unprecedented Weakening of First Amendment Rights?*

*1. The Demise of Net Neutrality: Will it Really Affect Free Speech?*

Although an internet filtered and blocked by the government may seem distant and impossible, considering cyberspace's role in the daily lives of Americans, the Trump administration's participation in ending net neutrality was the catalyst for possible oppression of free internet exchange in the United States. Because net neutrality rules have prevented ISPs from analyzing or manipulating the data internet users are sending or receiving, the destruction of those

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118. *Id.*

119. *Id.* at 24.

rules means that ISPs may now block traffic to certain websites, slow down internet speeds to hasten access to particular information, and show preference to favorable materials online.<sup>120</sup> In showing the importance of net neutrality to open online communication, the American Civil Liberties Union noted that net neutrality is “one of the foremost free speech issues of our time” because “freedom of expression isn’t worth much if the forums where people actually make use of it are not themselves free.”<sup>121</sup>

By promoting Ajit Pai and successfully ending net neutrality, the Trump administration has also approved many measures similar to the legal provisions already existing in the PRC. For instance, although the bill signed by President Trump in spring of 2017 does not require ISPs to document the internet activity of every user, it is similar to the 2000 Measures in that it strips internet users of privacy online. Furthermore, by ending net neutrality, ISPs will have similar abilities as those in the PRC to filter and block content in cyberspace. Overall, even though “[t]hese developments don’t on their own spell internet censorship. . . . they lay the groundwork for it”<sup>122</sup> and could rapidly cause certain online content in America to be freely policed by ISPs.

## 2. *Knight First Amendment Institute v. Trump: First Amendment Protection for Dissent on Social Media*

Although President Trump uses Twitter as a tool to connect with the American public, he has also used the capabilities of the social media site to control the people and the comments associated with his username. By blocking and attempting to uncover the identities behind the usernames of individuals who disagree with his policies, viewpoints, and tweets, President Trump’s actions have threatened the First Amendment right to speak freely about political topics and to criticize the government.

In May 2018, the United States District Court for the Southern District of New York ruled on the issue of President Trump blocking dissenting members of the American public on Twitter, and in accordance with previous Supreme Court rulings, the Court safeguarded the First Amendment.<sup>123</sup> In doing so, the court considered two questions: “whether a public official may, consistent with the

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120. See *What is Net Neutrality?*, AM. C.L. UNION, <https://www.aclu.org/issues/free-speech/internet-speech/what-net-neutrality> (last updated Dec. 2017).

121. *Id.*

122. Jacobson, *supra* note 112.

123. See *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 580 (S.D.N.Y. 2018).



First Amendment, ‘block’ a person from his Twitter account in response to the political views that person has expressed, and whether the analysis differs because that public official is the President of the United States.”<sup>124</sup> The court held that “[t]he answer to both questions is no.”<sup>125</sup>

In reaching its conclusion, the court conducted a multi-step inquiry, which started by deciding “‘whether’ the speech in which the individual plaintiffs seek to engage ‘is speech protected by the First Amendment.’”<sup>126</sup> In answering this threshold issue, the court easily determined that the plaintiffs’ desired speech fell within the ambits of First Amendment protection because it did not include a category of unprotected speech (such as obscenity, defamation, etc.) and because the Supreme Court has previously decided that political speech is protected by the First Amendment.<sup>127</sup>

Next, the court decided whether President Trump’s Twitter was a public forum susceptible to forum analysis,<sup>128</sup> an issue projected to be crucial to the Southern District of New York’s decision before arguments were heard.<sup>129</sup> Generally speaking, “forum analysis applies . . . in the context of protecting the First Amendment right of the public to speak or conduct expressive activities in certain areas of the public domain.”<sup>130</sup> Because forum analysis applies solely to spaces dedicated to public discourse, the court rejected the notion that the entirety of President Trump’s Twitter could be subject to forum analysis and limited the spaces of his Twitter account that could be considered.<sup>131</sup> Judge Naomi Reice Buchwald, writing for the court, specified:

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124. *Id.* at 549.

125. *Id.*

126. *Id.* at 564 (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

127. *Id.* at 564-65.

128. *Id.* at 565.

129. See Laura Sydel, *First Amendment Advocates Charge Trump Can’t Block Critics On Twitter*, NPR (Nov. 7, 2017, 4:54 PM), <https://www.npr.org/sections/alltechconsidered/2017/11/07/562619874/first-amendment-advocates-charge-trump-cant-block-critics-on-twitter> (noting that legal professionals have pointed out that if President Trump’s Twitter account is considered a public forum and not a private account, the President may not exclude someone from engaging in speech based on viewpoint); see also Brian P. Kane, *Social Media is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*, 60 ADVOCATE 31, 32 (2017) (highlighting the importance of distinguishing whether a public official’s social media accounts are used for personal or official purposes in determining whether the public official may block followers or commenters).

130. Carl E. Brody, Jr., *Considering the Public Forum Status of Government Internet Sites*, 44 STETSON L. REV. 389, 392 (2015).

131. *Knight*, 302 F. Supp. 3d at 566.

Plaintiffs do not seek access to the account as a whole—they do not desire the ability to send tweets as the President, the ability to receive notifications that the President would receive, or the ability to decide who the President follows on Twitter. Because the access they seek is far narrower, we consider whether forum doctrine can be appropriately applied to several aspects of the @realDonaldTrump account rather than the account as a whole: *the content of the tweets sent, the timeline comprised of those tweets, the comment threads initiated by each of those tweets, and the ‘interactive space’ associated with each tweet in which other users may directly interact with the content of the tweets by, for example, replying to, retweeting, or liking the tweet.*<sup>132</sup>

After narrowing the aspects of the @realDonaldTrump Twitter account that could be considered for forum analysis, the court then turned its focus to whether “the space in question [is] . . . owned or controlled by the government,” a necessary prerequisite to applying forum analysis.<sup>133</sup> Ultimately, because the President and his staff have control over many aspects of the @realDonaldTrump account at issue,<sup>134</sup> and the account is presented as a presidential account,<sup>135</sup> the court determined that “the governmental-control prong of the analysis is met.”<sup>136</sup> However, the court noted that the government-controlled aspects of the President’s account only included “the content of the tweets sent by @realDonaldTrump, the @realDonaldTrump timeline, and the interactive space associated with each tweet” and did not include the comment threads.<sup>137</sup> The court

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132. *Id.* (emphasis added).

133. *Id.*

134. *See id.* at 566-67 (noting that the President’s Twitter is government-controlled although Twitter is not a government-owned company because “the President and Scavino [White House Director of Social Media] . . . exercise control over various aspects of the @realDonaldTrump account: they control the content of the tweets that are sent from the account and they hold the ability to prevent, through blocking, other Twitter users, including the individual plaintiffs here, from accessing the @realDonaldTrump timeline (while logged into the blocked account) and from participating in the interactive space associated with the tweets sent by the @realDonaldTrump account.”).

135. *See id.* at 567 (establishing that President Trump’s Twitter is governmental because “(1) that the @realDonaldTrump account is presented as being ‘registered to Donald J. Trump, ‘45th President of the United States of America . . .’”; (2) ‘that the President’s tweets from @realDonaldTrump . . . are official records that must be preserved under the Presidential Records Act’; and (3) that the @realDonaldTrump account has been used in the course of the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy . . .”) (citations omitted).

136. *Id.* at 566.

137. *Id.* at 570.

noted that the comment threads of tweets were distinguishable because while the President and his staff could “control the interactive space by limiting who may directly reply or retweet a tweet initially sent by the @realDonaldTrump account, they lack comparable control over the subsequent dialogue in the comment thread.”<sup>138</sup> Additionally, the blocked accounts could still view and respond to replies in the comment threads of the @realDonaldTrump account’s tweets, which also indicates a lack of government control over comment threads.<sup>139</sup>

After deciding which spaces were government-controlled, the court “assess[ed] whether application of forum analysis is consistent with the purpose, structure, and intended use of the three aspects of the @realDonaldTrump account that . . . satisfy the government control-or-ownership criterion.”<sup>140</sup> Ultimately, because the government speaking on its own behalf falls outside forum analysis, the court decided that the content of the President’s tweets was not susceptible to forum analysis because the tweets “are solely the speech of the President or of other government officials.”<sup>141</sup> Accordingly, the timeline, which simply works to aggregate the content of all the President’s tweets, was also considered government speech by the court, and therefore, was also not susceptible to forum analysis.<sup>142</sup> However, the court did not consider the interactive space of the President’s tweets to be government speech because *any* Twitter user who was not blocked by the @realDonaldTrump account could interact and engage with the content of the tweet by replying, retweeting, and liking the tweet.<sup>143</sup> Therefore, the interactive space of the President’s Twitter was the only feature the court subjected to forum analysis.<sup>144</sup>

To determine how to apply the forum analysis to the interactive space of the @realDonaldTrump Twitter account, the court next had to determine what type of public forum the interactive space could be classified as.<sup>145</sup> The three types of fora for expressive activity outlined by the court were (1) public fora traditionally devoted to assembly and debate, (2) public property opened for use by the public as a place for expressive activity, and (3) a nonpublic forum that

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 571.

142. *Id.* at 572.

143. *Id.* at 572-73.

144. *Id.*

145. *Id.* at 573.

is not by tradition or designation a place for public communication.<sup>146</sup> The court easily determined that the interactive space of a tweet is not a traditional public forum because “there is simply no extended historical practice as to the medium of Twitter.”<sup>147</sup> However, because the interactive space is accessible to the public at large, and because anyone with a Twitter account can follow the @realDonaldTrump account and reply to and retweet tweets unless that individual has been blocked, the court concluded that the interactive space is a designated public forum.<sup>148</sup>

As the final step in its analysis, the court determined “whether the blocking of the individual plaintiffs is permissible in a designated public forum.”<sup>149</sup> Although regulation of a designated public forum is permissible only if the limitations on the forum satisfy strict scrutiny, the court noted that “[r]egardless of the specific nature of the forum . . . ‘viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum’s limitations.’”<sup>150</sup> The Plaintiffs involved in this litigation were blocked shortly after posting tweets that criticized the President and his policies.<sup>151</sup> Because the President and his staff blocked individuals based on the political views expressed in their tweets, the court concluded “that the blocking of the individual plaintiffs . . . is impermissible under the First Amendment.”<sup>152</sup> Interestingly, after concluding that blocking the Plaintiffs was unconstitutional, the court noted that although the Plaintiffs harm was minimal because they could still access the content of @realDonaldTrump account’s tweets and could reply to earlier replies to the President’s tweets, “the blocking of the individual plaintiffs has the discrete impact of preventing them from interacting directly with the President’s tweets, thereby restricting a real, albeit narrow, slice of speech. No more is needed to violate the Constitution.”<sup>153</sup>

Although President Trump unblocked the seven Twitter users involved in the *Knight* case, the Trump administration decided to appeal the Southern District of New York’s ruling to the United States Court of Appeals for the Second Circuit soon after Judge Naomi

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146. *Id.* at 573-74.

147. *Id.* at 574.

148. *Id.* at 574-75.

149. *Id.* at 575.

150. *Id.* (emphasis added) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)).

151. *Id.* at 553.

152. *Id.* at 577.

153. *Id.* (citation omitted).

Reice Buchwald entered her opinion.<sup>154</sup> Because the Supreme Court has consistently defended political dissent, the Second Circuit will likely uphold the Southern District of New York's decision in favor of the Plaintiffs due to the Trump administration's attempts to censor online opposition. However, it will be important to watch how the Second Circuit analyzes the First Amendment issues in this case and to see if the Supreme Court ever grants *certiorari* for this case.

### 3. *Potential Legal Measures: The Communications Act of 1934*

In addition to blocking opponents on social media and abolishing net neutrality, Timothy Edgar, an expert in cybersecurity, explains another route that the Trump administration could pursue in attempting to achieve the goal of “shut[ting] down” the internet.<sup>155</sup> He remarks:

If Trump decides to build a great firewall, he may not need Congress. Section 606 of the Communications Act of 1934 provides emergency powers to seize control of communications facilities if the president declares there is a “war or threat of war” or “a state of public peril.” In 2010, a Senate report concluded that section 606 “gives the President the authority to take over wire communications in the United States and, if the President so chooses, shut a network down.” With a stroke of a pen, Trump could invoke it.<sup>156</sup>

Although this provision has never been utilized by a commander-in-chief to dismantle the World Wide Web, there is nothing in the statute that excludes the internet from its reach.<sup>157</sup> Furthermore, Edgar also states that although First Amendment concerns may arise from the use of this provision, threats of terrorism and danger in wartime would likely be enough to *trump* any anxieties about freedom of online speech.<sup>158</sup> Therefore, if any emergency situation were to arise that could threaten the safety of the American public,

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154. Charlie Savage, *White House Unblocks Twitter Users Who Sued Trump, But Appeals Ruling*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/us/politics/trump-twitter-account-lawsuit.html>.

155. Lawson, *supra* note 11.

156. *Id.*; 47 U.S.C. § 606(d) (1934) (stating that in times of war, if the President “deems it necessary in the interest of the national security and defense,” the President may “suspend or amend the rules and regulations applicable to any or all facilities or stations for wire communication . . . [and] cause the closing of any facility or station for wire communication.”).

157. Lawson, *supra* note 11.

158. *Id.*

it seems that President Donald Trump could possibly take yet another unprecedented action and invoke the Communications Act of 1934 as a building block of the possible Great Firewall of America.

VI. CONCLUSION: THE STATEMENTS AND ACTIONS OF THE  
CURRENT ADMINISTRATION SHOULD RAISE CONCERNS ABOUT THE  
FUTURE OF FREE ONLINE SPEECH

Hundreds of years ago, President George Washington cautioned, “[T]he freedom of [s]peech may be taken away—and, dumb [and] silent we may be led, like sheep, to the [s]laughter.”<sup>159</sup> In the modern world, people have access to many innovative forums for speech, including the internet, that have become the primary vehicle for expression. Unfortunately, because of the internet’s endless capabilities, it is incredibly vulnerable to exactly the type of governmental control that President Washington rebuked.

Since its dawn, numerous countries around the world have worked to control cyberspace’s capacity for instantaneous, uninhibited online dialogue in order to prevent dissent, promote national unity, and to force the general populace to remain ignorant and silent.<sup>160</sup> China, the premier leader in internet censorship on the world stage, has successfully mixed stringent legal and technological controls with psychological tactics in order to build its Great Firewall of China, the barrier between Chinese citizens and the ability to post and search freely on the World Wide Web. Although such a barrier has never been a reality for the American people, the current President of the United States has openly discussed and has taken steps toward potentially preventing open exchange on the internet and has even employed tactics similar to those used by the Chinese government. Despite the First Amendment’s strong presence in American culture and in Supreme Court of the United States’ precedent, there still remains a possibility that the United States internet scheme could be manipulated and that online speech and access to content could be stifled. Although the Southern District of New York has recently ruled that the President is legally unable to block people, his recent actions that promoted the end of net neutrality and his wartime powers could potentially give him the opportunity to start “closing that internet up.”<sup>161</sup>

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159. *National Gazette*, MOUNTVERNON.ORG, <http://www.mountvernon.org/digital-encyclopedia/article/national-gazette/> (last visited Oct. 23, 2017).

160. See *Internet Censorship Listed: How does each country compare?*, GUARDIAN, <https://www.theguardian.com/technology/datablog/2012/apr/16/internet-censorship-country-list> (last visited Nov. 3, 2018).

161. Wagstaff, *supra* note 98.

Even though the threat to free internet speech in the United States is not directly imminent, the American populace, which passionately defends and emphatically reveres the First Amendment, should be aware of the current administration's initial successes in demolishing online freedom and laying the foundation for a potential Great Firewall of America.

Protecting Individuals’ Fourth Amendment Rights  
Against Government Usurpation: Resolutions to the  
Problematic and Redundant Community Caretaking  
Doctrine

Alyssa L. Lazar\*

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I. INTRODUCTION.

Over 200 years ago, the founding fathers equipped our nation with a document affording all citizens some basic, constitutional

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protections. For centuries, these protections existed unchanged.<sup>1</sup> But as time passed, society's need to maintain order and safety began to threaten these protections. In the 1970s, an exception to the Fourth Amendment of the United States Constitution surfaced, giving police the ability to respond to emergency situations at the expense of individual Fourth Amendment protections.<sup>2</sup> The exception, called the community caretaking doctrine, allows police officers to forgo Fourth Amendment protection to engage in community caretaking functions for society's greater benefit.<sup>3</sup>

In the past forty years, courts have adopted this exception and interpreted it differently. Some courts have applied the exception liberally,<sup>4</sup> beyond what was intended by the United States Supreme Court in the decision that adopted the community caretaking doctrine.<sup>5</sup> Other courts have refused to extend the exception,<sup>6</sup> and some have simply decided not to engage in the debate altogether.<sup>7</sup> Some note that even the United States Supreme Court, which was the first to apply the doctrine, has spoken so little about it.<sup>8</sup>

The exception is terrorizing the basic Fourth Amendment protection that our founding fathers vehemently fought to protect. Applying the doctrine to circumstances beyond its original intent threatens the very core protections delineated in the Constitution. It is time to re-prioritize the interests in the Constitution over the interests of police departments across the nation in maintaining order and safety.

This article will examine the history of the community caretaking doctrine, and how it has chipped away at core constitutional protections. Part II will discuss a doctrine that one may or may not have ever heard of: the community caretaking doctrine. Oftentimes, people know that police officers can forgo the Fourth Amendment for

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1. See U.S. CONST. (The United States Constitution is still our nation's governing document in the twenty-first century, and the Bill of Rights, including the First Amendment, still govern our behavior.).

2. Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 272 (1998) (discussing the community caretaking doctrine).

3. See *id.*

4. See, e.g., *Phillips v. Peddle*, 7 F. App'x 175, 179-80 (4th Cir. 2001) (applying the community caretaking doctrine to the warrantless search and seizure of the home).

5. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

6. See *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010).

7. *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) (applying the community caretaking doctrine to a warrantless search of a vehicle consistent with prior United States Supreme Court precedent).

8. David L. Hudson, *Courts in a Muddle Over 4th Amendment's Community Caretaking Exception*, ABA J. (Aug. 2013), [http://www.abajournal.com/magazine/article/courts\\_in\\_a\\_muddle\\_over\\_4th\\_amendments\\_community\\_caretaking\\_exception/](http://www.abajournal.com/magazine/article/courts_in_a_muddle_over_4th_amendments_community_caretaking_exception/).

the sake of the community, but they do not know the name of this doctrine. This section will discuss where the doctrine originated, and what exactly it means for Fourth Amendment protections.

Part III will discuss the problems that many courts are having with the doctrine: where to apply it and when. There exists a circuit split as to the way that the doctrine should be used to protect individuals from overreaching police intrusions. Some courts apply the doctrine solely to the warrantless search of vehicles. Other courts apply the doctrine not only to the search of vehicles, but also to the warrantless search of homes.

Part IV will discuss why the leading case about the community caretaking doctrine, *Cady v. Dombrowski*, should be overturned. The inherent problems with the doctrine, coupled with the fact that the Court is still unclear about the standards for applying the doctrine, prove that the Court's creation of the doctrine was impulsive and in error. The Fourth Amendment protects against unreasonable searches and seizures, and using the doctrine to establish reasonableness for a warrantless search and seizure is, quite frankly, unreasonable.

Part V will discuss an alternative argument: even if the community caretaking doctrine continues to stand, it should be limited, because it was not the Court's intent to apply the doctrine outside the context of vehicles. Further, there are significant other reasons, beyond the Court's intent, as to why the doctrine should be limited. Any extension of the doctrine beyond the home is unreasonable.

Part VI will discuss the final alternative argument. If the community caretaking doctrine remains standing as-is, without any limitations, an exclusionary rule should be applied to restore faith in police officers and further protect Fourth Amendment principles. The fruits of the search and seizure, as a result of an officer's use of the doctrine, should be suppressed in a court of law. Indeed, if courts adopt this latter argument, then, at the very least, citizens will feel more confident in their local police departments and perhaps be more cooperative with them.

## II. WHAT IS THE COMMUNITY CARETAKING DOCTRINE, AND WHERE DID IT COME FROM?

The framing document of the United States' government, the United States Constitution, was drafted to "combin[e] the requisite stability and energy in government, with the inviolable attention

due to liberty and to the republican form.”<sup>9</sup> The Anti-Federalists, who vehemently sought to limit a strong, centralized government, refused to ratify the Constitution without a Bill of Rights.<sup>10</sup> They claimed the Constitution did not contain a specific declaration about what the government could *not* do to basic, individual rights.<sup>11</sup> Written to pacify these concerns, the founding fathers wrote the Bill of Rights to protect individual citizens’ rights from government usurpation.<sup>12</sup>

It is the Fourth Amendment within the Bill of Rights that protects the right against unreasonable searches and seizures—a right that these original citizens believed to be naturally theirs.<sup>13</sup> It provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>14</sup>

The Fourth Amendment does not prohibit all searches or seizures—only those deemed unreasonable.<sup>15</sup> Reasonableness is set forth as the substantive command of the Fourth Amendment.<sup>16</sup> Although reasonableness has been set forth as the overarching norm, determining the meaning of reasonableness has been deemed an “elusive goal.”<sup>17</sup>

It is undisputed that the “ultimate touchstone” of the Fourth Amendment is reasonableness.<sup>18</sup> Scholars observe that no other provision of the Constitution mandates such an “open-ended interpretation” that requires “constructions that change with changing circumstances.”<sup>19</sup> They note that reasonableness is not determined

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9. THE FEDERALIST NO. 37 (James Madison).

10. *The Bill of Rights: A Brief History*, AM. C.L. UNION, <http://www.aclu.org/other/bill-rights-brief-history> (last visited Jan. 13, 2018).

11. *Id.*

12. *Id.*

13. *Id.*

14. U.S. CONST. amend. IV.

15. *Id.*

16. *See id.*

17. Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 158 (2008).

18. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

19. Raigrodski, *supra* note 17, at 158 (quoting Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994)).

by any fixed formula.<sup>20</sup> In fact, the Constitution does not define what is an unreasonable search,<sup>21</sup> and consequently, there is “no ready litmus paper test” available.<sup>22</sup>

Reasonableness is generally determined by a balancing of interests.<sup>23</sup> In *Terry v. Ohio*, the United States Supreme Court determined that reasonableness under the Fourth Amendment is calculated by balancing the government’s interests in conducting searches or seizures with the personal privacy and liberty interests invaded by them.<sup>24</sup> In *Bell v. Wolfish*, the Court explained the reasonableness standard:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. *Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.*<sup>25</sup>

Only unreasonable searches violate Fourth Amendment protections.<sup>26</sup> In essence, the text of the Fourth Amendment imposes two requirements on law enforcement: (1) all searches and seizures must be reasonable, and (2) probable cause must be established before a warrant is issued and that warrant must state, with particularity, the scope of the search.<sup>27</sup>

For much of the twentieth century, the United States Supreme Court held that the validity of a search was contingent on the presence or absence of a search warrant.<sup>28</sup> With this view in mind, if an officer obtained advance judicial authorization for a search in the form of a search warrant, then the search was presumed reasonable.<sup>29</sup> A warrant required probable cause.<sup>30</sup> A search or seizure on private premises without a warrant is still considered unreasonable

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20. *Id.*

21. *Id.*

22. *Id.* (quoting *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950)).

23. *Whren v. United States*, 517 U.S. 806, 817 (1996).

24. 392 U.S. 1, 21 (1968).

25. 441 U.S. 520, 559 (1979) (emphasis added).

26. *Id.* at 558.

27. *Kentucky v. King*, 563 U.S. 452, 459 (2011).

28. Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1134-35 (2012).

29. *Id.* at 1135.

30. *Id.*

under the Fourth Amendment unless it falls within a well-established exception to the Fourth Amendment warrant requirement.<sup>31</sup>

In the 1970s, one such exception emerged. The community caretaking doctrine was first recognized by the Court in *Cady v. Dombrowski*.<sup>32</sup> The case centered around Chester Dombrowski, a police officer in the city of Chicago.<sup>33</sup> On the night in question, Dombrowski had driven from Chicago to Wisconsin.<sup>34</sup> Dombrowski's car broke down on the side of the road in Wisconsin.<sup>35</sup> Dombrowski trekked to a local tavern, where he called the police.<sup>36</sup> After Dombrowski phoned the police, two Wisconsin officers picked Dombrowski up at the local tavern, and drove him to the scene of the accident.<sup>37</sup> The officers noticed that Dombrowski was very drunk.<sup>38</sup>

Because the Wisconsin officers believed that Chicago police officers were required by regulation to carry their service revolvers at all times, they attempted to locate Dombrowski's service revolver on his person.<sup>39</sup> Unable to find the service revolver, the officers took Dombrowski to the police station, where he was formally arrested for drunken driving.<sup>40</sup> Still concerned that Dombrowski did not have his service revolver on him, one of the officers went to look for the revolver in Dombrowski's vehicle that had since been towed.<sup>41</sup> Upon examination of the vehicle, the officer found incriminating evidence implicating Dombrowski in a murder.<sup>42</sup>

The lower courts concluded that the warrantless search of Dombrowski's vehicle was unconstitutional and that the seized items from the vehicle were inadmissible at his trial.<sup>43</sup> However, the United States Supreme Court concluded that the items were constitutionally seized.<sup>44</sup> It determined that "[l]ocal police officers . . . frequently investigate vehicle accidents in which there is no claim

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31. *Payton v. New York*, 445 U.S. 573, 586-87 (1980) (noting that property may be seized in plain view because there is no invasion of privacy and is presumptively reasonable).

32. 413 U.S. 433 (1973).

33. *Id.* at 435.

34. *Id.*

35. *Id.*

36. *Id.* at 436.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 437.

42. *Id.*

43. *Id.* at 444.

44. *Id.* at 449.

of criminal liability and engage in . . . community caretaking functions, *totally divorced* from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”<sup>45</sup>

The Court’s use of the words “totally divorced” authorized a warrantless search and seizure when the officers’ actions were *completely* separate from the officers’ investigation or suspicion of criminal activity.<sup>46</sup> For example, imagine an officer who is responding to a neighborhood break-in. The officer walks through the neighborhood to question each neighbor about whether they have recently been victims of a burglary. The officer knocks on a neighbor’s door, but there is no answer. The officer, confused because he sees a car with its engine running in the driveway, enters the neighbor’s unlocked home. The officer cannot find anyone on the main floor, so he decides to check the basement to see if the neighbor is down there. When the officer enters the basement, he finds a meth lab. Now, the neighbor faces drug charges and a prison sentence. The evidence of the meth lab can be used against her at her trial. Clearly, the officer did not have a warrant to search the neighbor’s home. However, because the officer was engaging in community caretaking functions by checking on the neighbor, a warrant was not required. The evidence the officer found is admissible because the officer’s actions in entering the home were totally divorced from the acquisition of the evidence of the meth lab.

The Court decided that encounters like these, where police are simply responding as “community caretakers,” are reasonable under the Fourth Amendment because they lack an investigatory purpose.<sup>47</sup> The officer in the above example neither entered the neighbor’s home to investigate a drug crime nor to continue his investigation into home burglaries. Similarly, the officers in *Cady* lacked an investigatory purpose when they sought to find Dombrowski’s service revolver.<sup>48</sup> Instead of finding the revolver, however, they found the fruits of a murder.<sup>49</sup> Moreover, the same doctrine outlined in *Cady* has been applied to warrantless automobile searches in circumstances unlike those found in *Cady*.<sup>50</sup> Rather than focusing on the facts in *Cady*, many state and federal courts distinguish

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45. *Id.* at 441 (emphasis added).

46. *Id.*

47. Mary Elisabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 338 (1999).

48. *Cady*, 413 U.S. at 437 (stating the purpose of searching the vehicle was to locate the service revolver, consistent with the police department’s standard procedure).

49. *Id.*

50. Naumann, *supra* note 47, at 351 (describing the Second and Sixth Circuit application of the doctrine outside of the *Cady* circumstances).

between investigatory and non-investigatory functions, extending the application of this doctrine far beyond the facts of *Cady*.<sup>51</sup> Many courts utilize this doctrine to justify initial encounters and subsequent intrusions in other circumstances where officers are acting as “community caretakers” generally.<sup>52</sup> Thus, *Cady* has sparked an endless debate about the situations in which the community caretaking exception applies.

In November of 2017, the Pennsylvania Supreme Court decided for the first time whether Pennsylvania recognizes the community caretaking doctrine as an exception to the Fourth Amendment.<sup>53</sup> This decision illustrates the trends that courts are following: to subsequently bless the holding in *Cady* and recognize the doctrine within their own jurisdictions.<sup>54</sup> These courts have come to recognize that community caretaking functions include a vast array of everyday police activities, most of which are intended to aid community members in danger of physical harm, and to create a sense of security within their own community.<sup>55</sup> Typically, community caretaking functions include activities like checking on noise disputes, attending to stray animals, and welfare checks on the elderly.<sup>56</sup>

Initially, the doctrine appears to be very narrow: it protects law enforcement officers’ intrusions when they are engaging in community caretaking functions.<sup>57</sup> However, some jurisdictions interpret the doctrine quite broadly.<sup>58</sup> These jurisdictions recognize that the doctrine encompasses multiple other Fourth Amendment exceptions, making it so broad.<sup>59</sup> One of these exceptions is the emergency aid doctrine, where an officer has an immediate, reasonable belief that a serious, dangerous event is occurring.<sup>60</sup> Another exception is the exigent circumstance exception, which applies when

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51. *Id.*

52. *Id.* at 352.

53. *Commonwealth v. Livingstone*, 174 A.3d 609 (Pa. 2017).

54. *Naumann*, *supra* note 47, at 351-52 (noting that a myriad of federal and state courts have adopted the doctrine but have added further nuances to it, making the doctrine differ from jurisdiction to jurisdiction).

55. *Livingston*, *supra* note 2.

56. *Id.*

57. *See Cady v. Dombrowski*, 413 U.S. 433 (1973).

58. *Naumann*, *supra* note 47, at 330.

59. *See State v. Blades*, 626 A.2d 273, 278 (Conn. 1993) (acknowledging that the emergency aid doctrine is considered a part of the community caretaking function); *see also Commonwealth v. Livingstone*, 174 A.3d 609, 626-27 (Pa. 2017) (“The community caretaking doctrine has been characterized as encompassing three specific exceptions: the emergency aid exception; the automobile impoundment/inventory exception; and the public servant exception, also sometimes referred to as the public safety exception.”); *Naumann*, *supra* note 47, at 330.

60. *Naumann*, *supra* note 47, at 331.

the police are acting in their “crime-fighting” role.<sup>61</sup> Despite the doctrine’s intent to aid the community, however, courts are in discord regarding whether the community caretaking doctrine should be interpreted broadly or narrowly to encompass these other Fourth Amendment exceptions. Some courts have observed that, for example, the exigencies giving rise to the exigent circumstance exception speak more to a “residual group of factual situations that do not fit into other established exceptions,”<sup>62</sup> i.e., the community caretaking doctrine. It appears that courts cherry-pick which exception they want to implicate to ensure that evidence will be admissible and the bad guy will be punished.<sup>63</sup> Although courts are inconsistent regarding the scope of the doctrine to encompass other exceptions, including exigencies, these inconsistencies need not be resolved today. This inconsistency does demonstrate, however, yet another problem with the community caretaking doctrine.

### III. THE COMMUNITY CARETAKING DOCTRINE AND THE CIRCUIT SPLIT: DOES ANYONE REALLY KNOW THE BEST INTERPRETATION?

The United States Supreme Court created an outline for how the community caretaking doctrine applies, but left many questions unanswered regarding its applicability. In *Cady*, the Court, arguably, limited its holding to automobile searches because the facts of the case pertained to an automobile search.<sup>64</sup> No language in the holding explicitly limits the applicability of community caretaker functions to incidents solely regarding automobiles; however, no language expands the applicability of community caretaker functions beyond automobiles.<sup>65</sup> Further, the Supreme Court has consistently remained silent on whether the doctrine can even be extended beyond the context of *Cady*.<sup>66</sup> Thus, a circuit split emerged regarding the applicability of the community caretaking doctrine outside the context of vehicles.

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61. *Id.* at 332.

62. *Murdock v. Stout*, 54 F.3d 1437, 1440 (9th Cir. 1995).

63. *See, e.g., State v. Comer*, 51 P.3d 55, 63, 65 (Utah Ct. App. 2002) (rejecting the trial court’s use of the emergency aid doctrine, but upholding a warrantless entry by police under the exigent circumstances exception to the Fourth Amendment).

64. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

65. Valerie Moss, *The Community Caretaking Doctrine: The Necessary Expansion of the New Fourth Amendment Exception*, 85 MISS. L.J. 9, 16 (2017).

66. *Hudson*, *supra* note 8.



The Third, Seventh, Ninth, and Tenth Circuits have erred on the side of caution and narrowly construed *Cady* to only apply to vehicles.<sup>67</sup> The Third Circuit has held that the community caretaking doctrine categorically does not extend to the warrantless searches of homes.<sup>68</sup> In *Ray v. Township of Warren*, the court refused to extend the doctrine to apply to homes because it determined that the Supreme Court's *Cady* ruling was expressly based on the distinction between automobiles and homes in the context of searches.<sup>69</sup> The Third Circuit further refused to cast aside the protection of the sanctity of the home, which was "embedded in our tradition since the origins of the Republic."<sup>70</sup> It also stated that the primary purpose of the Fourth Amendment was to guard against an unreasonable home entry.<sup>71</sup>

Similarly, the Seventh Circuit in *United States v. Pichany* refused to expand the community caretaking doctrine to the searches of homes or residences.<sup>72</sup> In this case, the officers discovered stolen property when they entered the defendant's warehouse while investigating the burglary of another nearby warehouse.<sup>73</sup> Warrantless searches are presumed unreasonable, and the court rejected the officers' argument that their warrantless search was justified under the community caretaking exception.<sup>74</sup> The Seventh Circuit reasoned that only specifically defined classes of cases are exempt from the presumption that a warrantless search is unreasonable, and the Supreme Court's holding in *Cady* did not mean that community caretaking searches of homes were a part of this defined class.<sup>75</sup>

The Ninth Circuit has also adopted a narrow construction of the community caretaking doctrine. In *United States v. Erickson*, a police officer was called to investigate a robbery at the defendant's home while the defendant was not there.<sup>76</sup> While inside the residence, the officer discovered marijuana plants.<sup>77</sup> The Ninth Circuit granted the defendant's motion to suppress the evidence and found

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67. See *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (holding that, in a scenario where officers enter a suspicious-looking garage and find methamphetamine, the community caretaking doctrine applies only to cases involving automobiles); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204, 208 (7th Cir. 1982).

68. *Ray*, 626 F.3d at 177.

69. *Id.*

70. *Id.* at 175 (quoting *Payton v. New York*, 445 U.S. 573, 601 (1980)).

71. *Id.*

72. 687 F.2d at 208-09.

73. *Id.* at 205-06.

74. *Id.* at 207-08.

75. *Id.* at 207-09.

76. 991 F.2d 529, 530 (9th Cir. 1993).

77. *Id.*

the officer's search to be unreasonable in violation of the Fourth Amendment.<sup>78</sup> However, the Ninth Circuit's reasoning differed from that of the Seventh Circuit. The Ninth Circuit reasoned that police interact with automobiles as a part of their community caretaking functions on a daily basis, and because of this frequent contact, people generally have a lower expectation of privacy with regards to their vehicles than they do with regards to their homes.<sup>79</sup>

In contrast to these circuits, three federal circuits—the Sixth Circuit, the Fourth Circuit, and the Eighth Circuit—have expanded the community caretaking doctrine to warrantless entries of homes.<sup>80</sup> In *United States v. Quezada*, the Eighth Circuit held that an officer can enter a home without a warrant when the officer has a reasonable belief of the existence of an emergency.<sup>81</sup> The officer in this case went to Quezada's apartment to serve a child protection order, but after shouting to announce himself several times with no answer, the officer went inside the apartment and found Quezada asleep on the floor with a shotgun underneath him.<sup>82</sup> Quezada was arrested for being a felon in possession of a firearm.<sup>83</sup> The Eighth Circuit noted that the shotgun was properly admitted into evidence because of the distinction between police officers' criminal investigatory functions and their community caretaking functions.<sup>84</sup>

In *United States v. Rohrig*, the Sixth Circuit also found that the community caretaking doctrine exception is a lawful extension of the doctrine in *Cady* because the officer's reason for entry into the defendant's home was unrelated to a criminal investigation, and thus, the warrant requirement was not directly implicated.<sup>85</sup> In *Rohrig*, officers responded to a noise complaint and entered the defendant's basement, thinking that the music was coming from inside.<sup>86</sup> Instead, they found a marijuana-growing operation and a shotgun.<sup>87</sup> The defendant moved to suppress the drugs and gun, on the grounds that the entry violated his Fourth Amendment rights.<sup>88</sup> The court disagreed, stating that "[h]aving found that an important

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78. *Id.*

79. *Id.* at 532.

80. Naumann, *supra* note 47, at 350; *see* *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *Phillips v. Peddle*, 7 F. App'x 175, 177 (4th Cir. 2001); *United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996).

81. 448 F.3d 1005, 1007 (8th Cir. 2006).

82. *Id.* at 1006.

83. *Id.* at 1007.

84. *Id.*

85. 98 F.3d 1506, 1523 (6th Cir. 1996).

86. *Id.* at 1509.

87. *Id.* at 1510.

88. *Id.*

‘community caretaking’ interest motivated the officers’ entry in this case, we conclude that their failure to obtain a warrant does not render that entry unlawful.”<sup>89</sup>

The Fourth Circuit also adopted a reasoning similar to the Sixth Circuit in holding that the community caretaking doctrine extends to homes, focusing on the distinction between community caretaking functions and functions that are solely for investigating crimes.<sup>90</sup> In *Phillips v. Peddle*, the officers entered the defendant’s home, without a warrant, to serve a subpoena on the defendant to testify in an ongoing federal criminal investigation.<sup>91</sup> The officers knocked on the defendant’s door, but he did not answer.<sup>92</sup> Then, they saw an unidentified car in the driveway.<sup>93</sup> Concerned because the defendant had spoken to the officers earlier that day, the officers entered his home.<sup>94</sup> The defendant, provoked by the violation of his Fourth Amendment rights, filed a Section 1983<sup>95</sup> action against the officers.<sup>96</sup> In response, the court granted the officer in question qualified immunity.<sup>97</sup>

Notably, the First and Second Circuit Courts, by contrast, have not ruled definitively on whether the community caretaking doctrine can justify a warrantless search of a home when not performed in response to an emergency situation.<sup>98</sup> When the exception is discussed by these circuits, they seem to skirt around the issue, and offer no clarity as to whether the doctrine is a distinct exception to the warrant requirement or to what circumstances it applies.<sup>99</sup>

Outside of the federal context, an increasing number of state courts have expanded the doctrine to encompass the warrantless entry of homes. The state of Maryland expanded the doctrine to homes in 1997 in *State v. Alexander*.<sup>100</sup> The Commonwealth of Virginia expanded the doctrine to homes in 1995 in *Commonwealth v.*

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89. *Id.* at 1523.

90. *Phillips v. Peddle*, 7 F. App’x 175 (4th Cir. 2001).

91. *Id.* at 177.

92. *Id.*

93. *Id.*

94. *Id.*

95. 42 U.S.C. § 1983 (1996) (allowing citizens to bring private actions against the Government for a violation of a citizen’s constitutional civil rights).

96. *Peddle*, 7 F. App’x at 177.

97. *Id.* at 177-78.

98. See *MacDonald v. Town of Eastham*, 745 F.3d 8, 13 (1st Cir. 2014) (“This court has not decided whether the community caretaking exception applies to police activities involving a person’s home.”); *Gombert v. Lynch*, 541 F. Supp. 2d 492, 504 n.6 (D. Conn. 2008) (acknowledging that the Second Circuit has not addressed the issue).

99. Mark Goreczny, *Taking Care While Doing Right by the Fourth Amendment*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 229, 244-46 (2015).

100. 721 A.2d 275 (Md. Ct. Spec. App. 1998).

*Waters*.<sup>101</sup> The states of California in 1999, South Dakota in 2009, and Wisconsin in 2013 expanded the doctrine to homes in *People v. Ray*,<sup>102</sup> *State v. Deneui*,<sup>103</sup> and *State v. Gracia*,<sup>104</sup> respectively.

Despite their well-thought out reasoning behind expanding the doctrine to cover homes and residences, the circuit courts of appeals and state courts that have expanded the community caretaking doctrines to the home have been met with intense criticism. Those who disagree with the discretion given to police to search homes under the doctrine have adopted Justice Brennan's warning in his dissent in *Cady*: "I can only conclude, therefore, that what the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles."<sup>105</sup> Specifically, those that oppose the doctrine fear that their privacy rights will be infringed. Privacy expectations reach their zenith in the home, which is accorded the full range of Fourth Amendment protections.<sup>106</sup> As the Court described in *Kentucky v. King*, "[i]t is a 'basic principle of Fourth Amendment law' . . . 'that searches and seizures inside a home without a warrant are presumptively unreasonable.'"<sup>107</sup>

It is clear courts vary greatly in their interpretation of how the community caretaking doctrine applies. Additionally, it is not only how the doctrine applies that results in so much disparity. Disparity also results from different interpretations of what is considered reasonable under the doctrine. To illustrate, the foundation of the doctrine is that it is reasonable to allow officers to forgo the warrant requirement when officers are engaging as community caretakers.<sup>108</sup> However, courts have changed the reasonableness requirements of the doctrine.<sup>109</sup> This creates even more disparity and confusion. As a result, courts that are interpreting the doctrine have little to no guidance on how to do so. Essentially, the reasonableness of a warrantless search and seizure is what gives the doctrine life. If it is not reasonable to cast aside individual's basic constitutional rights, then the doctrine cannot be used to protect officers.

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101. 456 S.E.2d 527 (Va. Ct. App. 1995).

102. 981 P.2d 928 (Cal. 1999).

103. 775 N.W.2d 221 (S.D. 2009).

104. 826 N.W.2d 87 (Wis. 2013).

105. *Cady v. Dombrowski*, 413 U.S. 433, 454 (1973) (Brennan, J., dissenting).

106. *Lewis v. United States*, 385 U.S. 206, 211 (1966).

107. *Kentucky v. King*, 563 U.S. 452, 459 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

108. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

109. See, e.g., *People v. Mitchell*, 347 N.E.2d 607, 610-11 (N.Y. 1976).

The most influential standard for assessing the reasonableness of a warrantless search and seizure—when there is a belief that an emergency is at hand—was coined in *People v. Mitchell*.<sup>110</sup> In *Mitchell*, the court authorized a warrantless search of hotel rooms to locate a missing housekeeper who was ultimately found murdered.<sup>111</sup> To determine the reasonableness of the entry, the court adopted a three-part test:

(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property[:]; (2) [t]he search must not be primarily motivated by intent to arrest and seize evidence[:]; [and] (3) [t]here must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.<sup>112</sup>

Many cases from several jurisdictions apply the *Mitchell* test.<sup>113</sup>

Looking at this three-part test, it would make sense for other courts to adopt it because it is a bright-line test that officers could easily apply. But quite the opposite has happened. In fact, in *Brigham City v. Stuart*, the United States Supreme Court eliminated the motive requirement articulated in *Mitchell*.<sup>114</sup> In *Brigham*, the Court applied a rather distinct reasonableness test and concluded that a police entry into a home was justified by the need to prevent violence and restore order.<sup>115</sup> It held that a warrantless entry is reasonable under the Fourth Amendment, “regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’”<sup>116</sup> Essentially, the Supreme Court eliminated the requirement of subjective good faith as outlined in *Mitchell*.<sup>117</sup> This adaptation of the *Mitchell* test does not make sense, but it shows that courts vary in their interpretation of the community caretaking doctrine in terms of how to define reasonableness.

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110. *Id.*

111. *Id.* at 608-09.

112. *Id.* at 609.

113. See, e.g., *Guererri v. State*, 922 A.2d 403, 407 n.7 (Del. 2007); *Riggs v. State*, 918 So.2d 274, 278-79 (Fla. 2005); *People v. Hebert*, 46 P.3d 473, 479 (Colo. 2002); *State v. Fisher*, 686 P.2d 750, 760-61 (Ariz. 1984).

114. 547 U.S. 398 (2006).

115. *Id.* at 406.

116. *Id.* at 404 (alteration in original) (first emphasis added) (quoting *Scott v. United States*, 436 U.S. 128, 138, (1978)).

117. See *id.*

Each court's decision to apply the community caretaking doctrine seems arbitrary, to say the least. Some courts are eager to expand the doctrine and give police more discretion.<sup>118</sup> As John Wesley Hall Jr. points out, the name "community caretaking exception" is "seductive" because it convinces the public that warrantless searches are justified and actually proper under the circumstances.<sup>119</sup> Others are eager to curb police discretion to afford greater protection to individuals' constitutional rights. They view it as a "monstrous leviathan that could devour" Fourth Amendment search and seizure protections.<sup>120</sup> No one knows the right way to interpret the doctrine. The problem is clear: the United States Supreme Court has written so little about the doctrine and has only referred to it sparingly.<sup>121</sup> Each case where it has referred to the doctrine has only involved the warrantless searches of automobiles.<sup>122</sup> As a result, courts are stuck with weighing the best options. What they fail to recognize, however, is that the best option is to eliminate the doctrine altogether.

#### IV. IT'S TIME TO OVERTURN *CADY* BECAUSE COURTS USE THE DOCTRINE TO CIRCUMVENT INDIVIDUALS' FOURTH AMENDMENT PROTECTIONS.

The United States Supreme Court should reverse the *Cady* decision because the community caretaking doctrine does not make a warrantless search, which is presumptively unreasonable, reasonable under the Fourth Amendment. Rather, the community caretaking doctrine, which is an exception to the Fourth Amendment, infringes on individuals' right to privacy. Only unreasonable searches violate Fourth Amendment protections,<sup>123</sup> and because the search exception under the doctrine is unreasonable, it unconstitutionally violates Fourth Amendment protections.

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118. See Hudson, *supra* note 8.

119. *Id.*

120. *Id.*

121. See Colorado v. Bertine, 479 U.S. 367 (1987); South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973).

122. See Bertine, 479 U.S. at 371 (holding that evidence discovered during inventory search of van was admissible); Opperman, 428 U.S. at 367 (holding that a routine inventory search of a locked automobile did not involve an unreasonable search in violation of Fourth Amendment); Cady, 413 U.S. at 433 (holding that warrantless search of a vehicle for a service revolver under the community caretaking doctrine was reasonable).

123. Bell v. Wolfish, 441 U.S. 520, 558 (1979).

Various exceptions, in addition to the community caretaking doctrine, to the Fourth Amendment have been established and recognized by many courts.<sup>124</sup> Consent, search incident to lawful arrest, plain view, the automobile exception, and hot pursuit are just five examples of exceptions to the warrant requirement.<sup>125</sup> The fact pattern must accommodate one of these exceptions in order for officers to forgo the warrant requirement,<sup>126</sup> and ultimately, many fact patterns do. For the purposes of this article, I do not argue that all exceptions, including the ones listed above, are unreasonable, and consequently unconstitutional. Rather, recognizing the viability of the community caretaking doctrine as an exception to Fourth Amendment protections, on top of the other already recognized ones, is unreasonable and unnecessary.

Restricting the number of exceptions and fact patterns eligible for using the exceptions to Fourth Amendment protections can allow courts to better protect individuals from illegal searches and seizures because it reduces the number of options that law enforcement officers can sporadically choose from to circumvent their legal duty to obtain a warrant.<sup>127</sup> Courts can, and should, restrict the use of the doctrine to advocate for the basic individual rights that our founding fathers thought so important to include in the Bill of Rights.

#### A. *The Community Caretaking Doctrine Does Not Satisfy Strict Scrutiny.*

Law enforcement officers implicate an individual's Fourth Amendment protection every time they enter an area where an individual has an objectively reasonable expectation of privacy.<sup>128</sup> Entering this area, without a warrant, under the justification that an officer is engaging in community caretaking functions is unreasonable. It is unreasonable because without an investigatory purpose, officers' search and seizure within a vehicle or home infringes

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124. *Exceptions to the Warrant Requirement*, L. SHELF EDUC. MEDIA, <http://law-shelf.com/courseware/entry/exceptions-to-the-warrant-requirement> (last visited Feb. 5, 2018).

125. *Id.*

126. *Id.*

127. See Barry Friedman & Orin Kerr, *The Fourth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-iv> (last visited Dec. 2, 2018) ("[T]here are so many exceptions that in practice warrants rarely are obtained.").

128. Michael T. Pettry, *The Emergency Aid Exception to the Fourth Amendment's Warrant Requirement*, L. ENFORCEMENT BULL. (Mar. 1, 2011), <https://leb.fbi.gov/articles/legal-digest/legal-digest-the-emergency-aid-exception-to-the-fourth-amendments-warrant-requirement>.

on an individual's constitutionally protected right of privacy. An individual's right of privacy should not be violated because of an arbitrary decision by officers that a person may be in danger or that an officer is simply acting as a community caretaker. Thus, the doctrine does not excuse officers for an unreasonable warrantless search and seizure.

The right to privacy includes the interest in independence in making certain kinds of important decisions without unjustified governmental interference.<sup>129</sup> The Restatement (Second) of Torts defines it as "the right to be let alone."<sup>130</sup> However the right of privacy is defined, it is of paramount importance to any society seeking to use the community caretaking doctrine as a shield from liability.

Further, the right of privacy is considered a fundamental right.<sup>131</sup> Although the Constitution does not mention the right of privacy in the Bill of Rights, the right of privacy has been recognized as an aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment.<sup>132</sup> It is "a right of personal privacy, or a guarantee of certain areas or zones of privacy."<sup>133</sup> Despite the Court's interest in protecting one's rights to privacy demonstrated by some famous holdings,<sup>134</sup> many courts infringe on the fundamental right to privacy by permitting law enforcement officers to engage in the community caretaking doctrine. As such, a constitutional analysis will show that the community caretaking doctrine cannot make an unreasonable search and seizure reasonable because it does not survive strict scrutiny.

Like other fundamental rights, the right of privacy is protected by strict judicial scrutiny that offers no deference to legislative judgment.<sup>135</sup> "Though not absolute, fundamental rights may only be limited upon proof that there is an extremely strong justification for doing so."<sup>136</sup> Thus, "[a]ny law impinging on a fundamental right will be struck down unless the government can prove that the law in question is precisely tailored to achieve a compelling state interest."<sup>137</sup>

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129. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977).

130. RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (AM. LAW INST. 1977).

131. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

132. *Carey*, 431 U.S. at 684.

133. *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

134. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992).

135. Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 979-80 (2006).

136. *Id.* at 980.

137. *Id.*



First, it is clear that the community caretaking doctrine limits individuals' rights to privacy and Fourth Amendment protections because it allows courts to use evidence obtained through a warrantless search and seizure against a defendant in a trial. However, use of the doctrine may be justified if it serves a compelling state interest. Arguably, though, there is no compelling state interest that justifies use of the community caretaking doctrine when there are so many other exceptions to the Fourth Amendment that officers regularly use to engage in many of the same functions. Consent, search incident to lawful arrest, the plain view exception, the automobile exception, and the hot pursuit exception are just five examples of exceptions to the warrant requirement.<sup>138</sup> For example, under the plain view exception, law enforcement officers are permitted to seize incriminating evidence if it is in plain view and if the officers have legally entered the premises.<sup>139</sup> Under the community caretaking doctrine, law enforcement officers similarly can seize incriminating evidence.<sup>140</sup> Moreover, it is clear the state's interest in protecting citizens and attending to their needs is already accomplished by the many other exceptions the legislature has carved out for emergency situations.

In addition, another exception would serve as a burden on law enforcement officers. Officers would have to consider which exception would be the most appropriate to implicate in order to shield themselves from liability and ensure that the potentially illegally obtained evidence could still be used in a court of law. Imposing this additional burden would not be a compelling state interest because it would complicate matters for law enforcement officers, who are simply trying to take care of the community. Indeed, the community caretaking doctrine does not satisfy strict scrutiny.

*B. The Community Caretaking Doctrine Cannot Make an Unreasonable Search Reasonable Because of its Chilling Effect.*

In addition, taking away or infringing on an individual's right of privacy by recognizing the community caretaking doctrine has a severe chilling effect, especially on those who want to seek help, but do not for fear of being incriminated of a crime. One example is a domestic violence situation, wherein a woman who has been beaten or abused severely refuses to call the police because she has drugs

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138. *Exceptions to the Warrant Requirement*, *supra* note 124.

139. *Id.*

140. *Id.*

in her home. Another example comes from a case in Pennsylvania.<sup>141</sup> The appellant in the case was pulled over onto the right shoulder of the road.<sup>142</sup> Her engine was running, but the hazard lights were not activated.<sup>143</sup> An officer, traveling northbound, saw the appellant's vehicle, activated his emergency lights, and pulled alongside her vehicle.<sup>144</sup> The appellant was "sitting in the driver's seat and appeared to be entering an address into her vehicle's navigation system."<sup>145</sup> The officer described the appellant as "glossy eye[d]" and "looking through [him]."<sup>146</sup> The officer then pulled his vehicle in front of appellant's and approached her on foot.<sup>147</sup> The officer, suspecting that appellant had been drinking, asked appellant to exit the vehicle and undergo a field sobriety test.<sup>148</sup> The test revealed that appellant had a blood alcohol content of .205%, and she was subsequently arrested and charged with driving under the influence of alcohol (DUI).<sup>149</sup> The appellant moved to suppress the evidence of the DUI on the ground that it was an illegal investigatory stop.<sup>150</sup> The Pennsylvania Supreme Court concluded that there was in fact an illegal investigatory stop.<sup>151</sup>

The Pennsylvania Supreme Court held that the Superior Court erred in upholding the appellant's charges because requiring the appellant to take a field sobriety test was not justified under the community caretaking doctrine.<sup>152</sup> Despite ultimately reaching the correct conclusion, the appellant was arrested in June of 2013, and the Pennsylvania Supreme Court's decision was not rendered until November of 2017.<sup>153</sup> For four years, the appellant's constitutional rights were cast aside on the grounds that the police had more important, community caretaking functions to attend to.

Despite reaching the correct conclusion with regards to the appellant's case in particular, the Pennsylvania Supreme Court took

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141. *Commonwealth v. Livingstone*, 174 A.3d 609 (Pa. 2017) (recognizing the public servant exception as a category within the community caretaking doctrine, which this article will not be addressing).

142. *Id.* at 614.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (second alteration in original).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 615.

151. *Id.* at 614.

152. *Id.* at 614, 627.

153. *Id.* at 613.

the opportunity to recognize the community caretaking doctrine exception to the warrant requirement.<sup>154</sup> However, this was error. Again, this exception exists to provide yet another avenue that courts can take to admit incriminating evidence. Although the appellant's rights in this case were eventually recognized, the bigger problem is that the Pennsylvania Supreme Court effectively provided officers an avenue to circumvent the warrant requirement.

V.      IF WE KEEP THE *CADY* HOLDING, LET'S LIMIT THE *CADY* DECISION TO THE *CADY* CIRCUMSTANCES.

At the same time as saying the community caretaking doctrine is a viable exception to the Fourth Amendment, the Pennsylvania Supreme Court was very clear to restrict application of the community caretaking doctrine to vehicles, refusing to address the question of whether it is a violation of individual rights to recognize the exception with regard to homes.<sup>155</sup> It is clear that case law unanimously recognizes the doctrine to apply to vehicles.<sup>156</sup> Because many courts refuse to engage in the debate regarding homes altogether, courts should take the guesswork out by refusing to construe the doctrine to include the warrantless searches of homes.

Although the Supreme Court has ruled that law enforcement of officers can search a vehicle without a warrant as a result of their community caretaking function, it has not ruled on whether community caretaking can justify a warrantless search in a home. In fact, the Supreme Court has referred to the doctrine sparingly.<sup>157</sup> The doctrine has only been referenced by the Court in *Cady*, *Opperman*, and *Bertine*.<sup>158</sup> Each of these decisions carefully invoked the doctrine only in the context of automobiles.<sup>159</sup> Moreover, in each case, the Court was clear to recognize the distinction between the home and the automobile.<sup>160</sup> For example, in *Opperman*, the Court stated that it "has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment."<sup>161</sup> Further, many circuits have interpreted this language to

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154. *Id.* at 638.

155. *Id.* at 618 (describing the issue on review as whether a reasonable motorist would feel free to leave prior to the approaching officer stopping to interact with her).

156. See, e.g., *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

157. See *Hudson*, *supra* note 8.

158. *Id.*

159. *Id.*

160. *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

161. *Opperman*, 428 U.S. at 367.

restrict expansion of the doctrine. For example, the Seventh and Ninth Circuits restricted the doctrine on the grounds that protecting the sanctity of the home has been a staple motivation since the beginning of our nation.<sup>162</sup> Scaling back the doctrine to exclude warrantless searches of homes, then, is consistent with Supreme Court precedent. Using the doctrine to conduct a warrantless search of a vehicle is the only constitutionally protected interpretation.

The United States Supreme Court did not intend the doctrine to be used to authorize a warrantless search and seizure within the home. For the purposes of the Fourth Amendment, the Court stated that there is a constitutional difference between houses and cars.<sup>163</sup> Officers come into contact with vehicles more frequently.<sup>164</sup> States require vehicles to be registered and licensed.<sup>165</sup> States have enacted codes to regulate the condition and manner in which vehicles are kept.<sup>166</sup> “[T]he extent of police-citizen contact involving” vehicles is “substantially greater than police-citizen contact” involving homes.<sup>167</sup> Following the extensive discussion about the difference between homes and vehicles, the Court confined the doctrine to the vehicle, making it clear that the Court’s intent was to restrict use of the doctrine to the vehicle.<sup>168</sup>

If Congress’ intent is not persuasive, then, at the very least, the right of privacy should be. The doctrine should not be extended to the home because the right of privacy is at its height within the home, and conducting searches and seizures within the home without a warrant is a severe violation of both an individual’s Fourth Amendment protection and right of privacy.<sup>169</sup> The home was first deemed a sanctuary in 1966,<sup>170</sup> and is still considered a sanctuary almost fifty years later.<sup>171</sup> Further, courts have already recognized that a person’s home in particular receives a heightened level of

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162. See *United States v. Erickson*, 532 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204, 208 (7th Cir. 1982).

163. *Cady*, 413 U.S. at 442.

164. *Id.* at 441.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 441-42.

169. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004).

170. See *Osborn v. United States*, 385 U.S. 323 (1966).

171. See *McDonald v. City of Chi.*, 561 U.S. 742 (2010) (recognizing the home provides a kind of special sanctuary in modern life).

protection from unreasonable searches and seizures.<sup>172</sup> In *Silverman v. United States*, the United States Supreme Court determined that the actions of police officers in attaching an electronic device to a heating duct in the defendant's home constituted a violation of the defendant's Fourth Amendment rights.<sup>173</sup> As a result, the conversations that the officers heard as a result were inadmissible in court.<sup>174</sup> More recently, in *Groh v. Ramirez*, the Supreme Court stated that the warrantless search of a person's home is presumptively unreasonable.<sup>175</sup> In *Groh*, the defendant's Fourth Amendment rights were violated because the search warrant was facially invalid because it failed to describe the persons or things to be seized in particular.<sup>176</sup>

The doctrine should also be scaled back because the Supreme Court contradicts itself in its own case law, making it extremely unclear what interests the lower courts should be seeking to protect.<sup>177</sup> Lower courts are left with determining whether an individual's Fourth Amendment rights should be protected, whether the perpetrator should be caught at the expense of those Fourth Amendment rights, whether an individual's safety is paramount to his or her own Fourth Amendment rights, or whether one's expectation of privacy is more important.<sup>178</sup> Indeed, to eliminate confusion and restore confidence in police officers, the community caretaking doctrine, affording officers the ability to enter homes without a warrant, should not be accepted by courts. Officers, in using this exception, can hide from liability by cherry-picking which right they thought to be most important, and use that to justify their decision.

If courts continue to give credence to the community caretaking doctrine's applicability within the home, which has not been expressly allowed by the Supreme Court, courts will effectively be creating a slippery slope wherein officers can use the doctrine to say

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172. *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

173. *Id.* at 511-12.

174. *Id.* at 512.

175. 540 U.S. 551, 552 (2004).

176. *Id.*

177. *Compare* *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (distinguishing a search from the home from the search of a vehicle, and holding that the community caretaking doctrine is limited to the search of vehicles), *with* *Michigan v. Tyler*, 436 U.S. 499, 500 (1978) (holding that the police and firefighters had searched the home in accordance with the Fourth Amendment, but did not diminish any reasonable person's expectation of privacy nor the Fourth Amendment protection because the "purpose [was] to ascertain the cause of [the] fire rather than to look for evidence of a crime . . .").

178. *See Michigan*, 436 U.S. at 499.

they are engaging in community caretaking functions, but are actually investigating crimes. I fear that as technology advances, so too will the exceptions that allow officers to invade the privacy of those devices.<sup>179</sup> As the Court in *Carpenter v. United States* stated, the Fourth Amendment was drafted to be tied to common-law trespass and intrusions by the government on physical property, not the new “phenomenon” of cell phone signals.<sup>180</sup> Arguably, officers can use the community caretaking doctrine in particular to ignore Fourth Amendment protections when citizens are in trouble and when officers would not otherwise have access to cell phone records. The fact that there are already so many other exceptions shows courts’ willingness to continue to create exceptions to accommodate for technology advances and lifestyle changes. This needs to stop, right here, right now, with the community caretaking doctrine.

VI. ALTERNATIVELY, THE DOCTRINE CAN STAND, BUT THE  
FRUITS OF THE SEARCH MUST BE SUPPRESSED UNDER AN  
EXCLUSIONARY RULE.

Proponents of the community caretaking doctrine argue that the doctrine was designed in good faith, by “a desire to aid victims rather than investigate criminals.”<sup>181</sup> The Supreme Court of Delaware describes the basis for the community caretaking doctrine as follows:

The modern police officer is a ‘jack-of-all-emergencies,’ with ‘complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses’; by default or design he is also expected ‘to aid individuals who are in danger of physical harm,’ ‘assist those who cannot care for themselves,’ and ‘provide other services on an emergency basis.’ To require reasonable suspicion of criminal activity before police can investigate and render assistance in these situations would severely hamstring their ability to protect and serve the public.<sup>182</sup>

There is no doubt this is true. If the community caretaking doctrine is to stand, as is, it would undoubtedly allow law enforcement

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179. *But see* *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (holding that in light of the immense storage capacity of modern cell phones, “police officers must generally obtain a warrant before searching the contents of a phone”).

180. *Id.* at 2213, 2216.

181. *Commonwealth v. Livingstone*, 174 A.3d 609, 627 (Pa. 2017) (quoting *State v. Ryon*, 108 P.3d 1032, 1043 (N.M. 2005)).

182. *Williams v. State*, 962 A.2d 210, 216-17 (Del. 2008) (footnote omitted).

to provide services and aid individuals who need help. Further, it is unlikely that courts will refuse to acknowledge the doctrine altogether. There is Supreme Court precedent, albeit very little, that plainly recognizes the validity of the doctrine.

Thus, as an alternative to getting rid of the doctrine altogether, or even scaling the doctrine back, courts should continue to allow law enforcement officers to use the doctrine as an exception to getting a warrant on only one condition: any incriminating evidence that officers find should be suppressed at later hearings.

Since *Mapp v. Ohio*,<sup>183</sup> exclusion of incriminating evidence obtained unlawfully has been the norm, and awarding damages for the unlawful behavior has been the exception.<sup>184</sup> Some commentators, including Wayne R. LaFave, have argued for an exclusionary rule for evidence found during community caretaking searches.<sup>185</sup> An exclusionary rule would, in effect, deter police from entering premises without a warrant under the community caretaking justification, when actually motivated by law-enforcement concerns.<sup>186</sup> Moreover, it would achieve a practical solution to the problem of law enforcement officers using a community caretaking search.<sup>187</sup>

Opponents of an exclusionary rule argue that the Supreme Court has never required exclusion where police action has been reasonable; rather, an exclusionary rule has only ever applied where constitutional rights have been infringed.<sup>188</sup> Unless the officers have acted blamefully, courts refuse to invoke the exclusionary remedy.<sup>189</sup> Other critics of the exclusionary rule argue that the rule, in effect, really only benefits those that are actually guilty of a crime.<sup>190</sup> The rule is typically invoked in criminal cases where the only reason to suppress the evidence is if it leads to the conclusion that the defendant is guilty.<sup>191</sup> In fact, some critics argue that the injury suffered by the person seeking suppression is severely mitigated when, although an officer may not have had probable cause

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183. 367 U.S. 643 (1961).

184. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 910 (1991).

185. 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 6.6(a) (5th ed. 2018).

186. Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1558 (2009).

187. See *Provo City v. Warden*, 844 P.2d 360, 365 (Utah Ct. App. 1992) (“This [exclusionary rule] appears to be a legitimate means of encouraging genuine police caretaking functions while deterring bogus or pretextual police activities.”).

188. Dimino, *supra* note 186, at 1559.

189. *Id.* at 1559-60.

190. Stuntz, *supra* note 184, at 911.

191. *Id.*

to believe, for example, that there was cocaine in the trunk of a defendant's car, there was in fact cocaine in the trunk, and in hindsight, the officer had probable cause.<sup>192</sup>

Nonetheless, an exclusionary rule would be most appropriate. First, courts have difficulties "valuing" the harm caused by illegal searches and seizures in order to assess damages.<sup>193</sup> Under an exclusionary rule, courts do not have to deal with the valuing problem.<sup>194</sup> They do not have to price anything; all they have to do is suppress evidence.<sup>195</sup> Second, an exclusionary rule deters police misconduct because many searches are motivated by a desire to catch and punish criminals, at the expense of violating basic constitutional rights.<sup>196</sup> The exclusionary rule takes away this "gain" that officers receive when they discover fruits in a search that were unlawfully obtained.<sup>197</sup> Third, it mitigates police perjury.<sup>198</sup> Officers may tend to distort the evidence that was available at the time of the search to qualify themselves for protection under a warrant.<sup>199</sup> One example of police perjury includes an officer concocting a "fictitious 'tip' that provides a series of incriminating details, corresponding exactly to facts the officer observed" when conducting the search.<sup>200</sup>

## VII. CONCLUSION: IT'S TIME FOR SOME CHANGE.

If one thing is clear after reading this article, it should be this: the community caretaking doctrine is just another superfluous exception to the Fourth Amendment that needs to go. First, the doctrine is confusing to courts who are trying to interpret and apply it. This is demonstrated by the inconsistencies between courts' interpretations. Second, the doctrine does not satisfy strict scrutiny, especially because it invades the sanctity of the home.

I recognize the difficulties of overturning Supreme Court precedent. Thus, at a minimum, if law enforcement officers gain incriminating evidence after engaging in community caretaking functions, an exclusionary rule should apply because it is unfair to allow incriminating evidence to be used against a defendant at trial when all the defendant wanted was help. Nevertheless, an exclusionary

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192. *Id.* at 912.

193. *Id.* at 910.

194. *Id.*

195. *Id.*

196. *Id.* at 910-11.

197. *Id.*

198. *Id.* at 914.

199. *Id.*

200. *Id.*



rule would not be necessary if courts simply recognized what *Cady* actually said about the applicability of the doctrine—that the doctrine applies solely in the context of vehicles.







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